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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 365

CITY OF NASHVILLE, ET AL., *Appellants*;

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

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ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

Appellants, City of Nashville, Davidson County, Tennessee, the State of Tennessee, and Tennessee Public Service Commission, appeal from the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, entered on June 20, 1957, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal (subject to one qualification, to which the Court's attention will be called), and that substantial questions are presented.

OPINION BELOW

The District Court delivered no written opinion but filed findings of fact and conclusions of law, which have not been reported. Copies of the findings of fact and conclusions of law and judgment are attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 U. S. C., Section 1336, to enjoin, set aside and annul an order of the Interstate Commerce Commission, authorizing, among other things, the merger of the Nashville, Chattanooga & St. Louis Railway into the Louisville & Nashville Railroad Company, and the acquisition of direct control by the Atlantic Coast Line Railroad Company of the surviving corporation and indirect control of such corporation by the Atlantic Coast Line Company. The City of Nashville, as plaintiff, and the State of Tennessee, Tennessee Public Service Commission, Davidson County, Tennessee, NC&StL Railway Employees Job Protection Association, and Robert L. Bryson, Luther Thomas Lambert and Vernon H. Hedgepath, individually, and as representatives of a class composed of 839 employees of the Nashville, Chattanooga & St. Louis Railway, as intervening plaintiffs, alleged invalidity of the order of the Commission on various grounds.[1]

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[1] For convenience, the Nashville, Chattanooga & St. Louis Railway will be referred to as the Tennessee Company, the N. C. & St. L., or the N. & C.; the Louisville & Nashville Railroad Company as the Kentucky Company or the L. & N.; the Atlantic Coast Line Railroad Company as the Coast Line; the Atlantic Coast Line Company as the Connecticut Company; and the Interstate Commerce Commission as the I.C.C. or the Commission.

The complaint was filed in the United States District Court for the Middle District of Tennessee at Nashville, presided over by District Judge William E. Miller. On account of his illness, Circuit Judge John D. Martin sat by designation, and issued a temporary restraining order on April 8, 1957. Following the filing of the complaint, the I.C.C. issued an order postponing for three days the effective date of the original order; and following the issuance of the temporary restraining order the I.C.C. issued a further order postponing the effective date indefinitely.

The Chief Judge of the Sixth Circuit, purporting to act pursuant to 28 U. S. C. 2284, designated District Judge Leslie R. Darr and District Judge Roy M. Shelbourne to sit with Judge Martin for the hearing of an application for an interlocutory injunction. It was agreed that the hearing would be a final hearing on the merits upon demand for a permanent injunction. Following such hearing, findings of fact and conclusions of law were filed May 24, 1957, and judgment was entered on June 20, 1957, dismissing the complaint. Notice of appeal was filed in the United States District Court for the Middle District of Tennessee, Nashville Division, on July 26, 1957, after the I.C.C. had issued a new order, dated July 10, 1957, fixing August 14, 1957, as the new effective date of its original order.

Assuming that the three-judge court was properly constituted the jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by 28 U. S. C., Section 1253 and Section 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Swift & Co. v. United States,*

(1952) 343 U. S. 373; *Railway Labor Executives Ass'n. v. United States*, (1950) 339 U. S. 142.

If the three-judge court was not properly constituted[2] the judgment dismissing the complaint was, in effect, the action of a single judge, acting without jurisdiction, and the Supreme Court has no jurisdiction of the appeal. *Stratton* v. *St. Louis S. W. Railway*, 282 U. S. 10; *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132.

STATUTES INVOLVED

The pertinent portions of the statutes involved are set forth in Appendix B hereto, including provisions of the Administrative Procedure Act, the Interstate Commerce Act, and the Tennessee corporation law.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the I.C.C. correctly interpreted the present transportation policy of Congress (Interstate Commerce Act, Title 49, U. S. Code, "national transportation policy" before Section 1, as well as Section 5, and Sherman Act, Title 15, U. S. Code, Section 1) as being to "'foster and promote" the voluntary union of railroads, to the end that the resulting combinations will be financially stronger and able to "meet more effectively competition from other modes of transpor-

[2] Par. 1 of 28 U. S. C., Section 2284, provides that the chief judge of the circuit "shall designate two other judges, at least one of whom shall be a circuit judge." Par. 5 provides that a single judge shall not "dismiss the action." The statute is "technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States*, 312 U. S. 246, 251.

tation" (which are said to be "subsidized" by Congress and by state and local governments), without regard to whether the lines of the railroads involved are naturally competitive rather than complementary; or whether they are able to continue to provide adequate transportation service to the public under separate managements; or whether any immediate and direct improvement in service to the public is contemplated as the result of the union.

2. Whether in appraising the effects of the curtailment of competition which will result from the proposed merger of the Tennessee Company into the Kentucky Company, it was sufficient for the I. C. C. to consider the effects of the elimination of "such competition as now exists," where the Kentucky Company owns 74.9 per cent of the capital stock of the Tennessee Company and has used said control (without I.C.C. approval) to maintain for many years a combination in restraint of trade by restricting and suppressing the latter's competition with respect to rates and routes; or whether the I.C.C. should have treated the status quo as unlawful and therefore abnormal, and should have considered whether the merger is more or less in the public interest than the situation which would exist if the unlawful combination in restraint of trade were discontinued.

3. Whether the I.C.C. correctly interpreted Section 5(2)(c) of the Interstate Commerce Act to mean that the adverse effect on employees resulting from the merger is not to be considered a disadvantage to the public interest, in determining whether the merger is, on balance, consistent with the public interest, so long as protective conditions for employees are imposed under Section 5(2)(f); and whether the District Court

properly dismissed the complaint after stating that its approval of the Commission's order was upon an "express condition" (not incorporated in the Commission's order) that the rights of the employees of both railroads "be protected equally . . . as relates to seniority and to other conditions of employment."

4. Whether the I.C.C. order approving the merger was issued "without observance of procedure required by law" after taking "due account" of the "rule of prejudicial error," (Title 5, U. S. Code, Section 1009(e)), where the I.C.C. declined to issue a *subpoena duces tecum* for "studies" alleged in the application for the merger to have been the basis of the decision to merge (Title 5, U. S. Code, Section 1005(c)), and where the Examiner restricted cross-examination "required for a full and true disclosure of the facts" (Title 5, U. S. Code, Section 1006(c)), by not requiring applicants' witnesses to produce on cross-examination these same "studies," (which related to the effect of the merger on traffic and on transportation service) or to produce figures called for by interveners to test the validity of *ex cathedra* opinions expressed by applicants' witnesses, and by excluding these studies and figures on the ground that since the burden of proof was on the applicants, it was "their responsibility to decide, at their own risk, the nature and kind of evidence to be presented in support of the application.".

5. Whether the District Court in reviewing the order of the I.C.C. correctly interpreted Title 5, U. S. Code, Section 1009(e), and duly observed the requirements of the statute with respect to judicial review, or gave same too narrow a scope.

6. Whether evidence of anticipated "savings and economies" to be accomplished by the merger,—a major portion from the displacement of employees,—constituted a sufficient basis (although there was positive evidence to the contrary) for the inference by the I.C.C. that "the combined properties will be operated more efficiently than they are now under separate managements," or for the inference that in the "long run" improvement in service "should result," with the result that "the merger would enhance the adequacy of service by the merged companies and would constitute the best use of the facilities" of the involved companies; and whether these anticipated "savings and economies" are a sufficient advantage to the public interest, although "no immediate and direct improvement in service" is contemplated, "to outweigh the disadvantage to the single locality of Nashville" in determining whether the merger is, on balance, consistent with the public interest.

7. Whether the conclusion that the merger is consistent with the public interest should be sustained where the report affirmatively shows that the I.C.C. gave weight as considerations in favor of the merger to the fact that "no other carrier opposed the merger," the fact that "the numerous witnesses offered by the applicants overwhelmingly favored the proposed merger," and the fact that, "except for railway labor organizations the principal opposition to the proposed merger emanated from the city of Nashville and from Davidson County," while, on the other hand, the report fails to indicate that any weight whatever was given to expert testimony that the merger will not result in

the best use of the facilities, or to the failure of any officer of the Tennessee Company to testify in support of the opinions given by officers of the Kentucky Company, or to the refusal of the applicants to produce as a part of the record documents and figures called for on cross-examination by interveners in opposition, including "studies" which the application alleged to be the basis of the decision to merge.

8. Whether the report of the I.C.C. meets the requirements of the Administrative Procedure Act, Title 5, U. S. Code, Section 1007(b), in view of the fact that no grounds or reasons are given for rejecting the contentions on major issues in the controversy set forth in exceptions to the proposed report of the Examiner, but instead the portions of the proposed report to which the exceptions related are copied verbatim in the Commission's report, with the statement that rulings on the exceptions are "reflected in our findings and conclusions," and whether the conclusions are too "foggy" to meet the requirements of the Act.

9. Whether the conclusion of the I.C.C. "that the transactions will be consistent with the public interest" was based on adequate findings supported by substantial evidence (determined by a review of the whole record, or portions thereof cited by counsel) presented at hearings at which procedure required by law was duly observed.

10. Whether a justiciable issue presently exists in this cause with respect to the construction of Section 5(11) of the Interstate Commerce Act, or whether it is consistent with the Tenth Amendment, by reason of

the contention of appellants that Tennessee law authorizes a "consolidation" but makes no provision for a "merger" of the character proposed and "authorized"; and if a justiciable issue is presented, whether (a) Congress did intend to grant to the I.C.C. the power to supply deficiencies in state law, by authorizing a form of transaction with respect to which state law is silent, and (b) if Congress did so intend, whether Congress had the power, in view of the Tenth Amendment, to grant such power to the I.C.C.

11. (a) Whether effectuation of the merger, pursuant to the order of the I.C.C., would be a violation of Section 5(4) of the Interstate Commerce Act by the participants, on the theory that such merger would amount to the acquisition of control of the merged company by Mercantile-Safe Deposit & Trust Company of Baltimore, as sole trustee under various trusts, which already has control of other carriers but was not a party to the instant proceeding and whose acquisition of such control was not found by the I.C.C. to be consistent with the public interest; and if so whether it was the responsibility of applicants to raise the question, or for the Commission to raise it, *sua sponte;* and (b) whether the District Court should have considered the question, when called to its attention by plaintiff and intervening plaintiffs following the decision in *Alleghany Corporation* v. *Breswick & Co.,* April 22, 1957, or properly refused to consider it because the I.C.C. had not considered it.

12. Whether Section 15(2) of Title 49, U. S. Code, requiring orders of the I.C.C., other than orders for the payment of money, to take effect within "not less

than thirty days" relates to orders under Section 5(2); if so, whether an order complies with said requirement which is to take effect forty days from the date it bears, March 1, 1957, although not released until March 13, 1957, and if such an order does not comply, is its invalidity cured by subsequent orders, issued after an action has been filed to annul the original order on this and other grounds, which postpone the effective date of the original order, first for three days, and then indefinitely.

STATEMENT OF THE CASE

The Kentucky Company, the Tennessee Company, the Coast Line, and the Connecticut Company, hereinafter sometimes referred to collectively as the applicants, on January 28, 1955, jointly applied for authority under Section 5(2) of the Interstate Commerce Act, as amended, to merge the properties and franchises of the Tennessee Company and the Kentucky Company for ownership, management and operation. The Connecticut Company and the Coast Line joined in the application because of their control through stock ownership of the Kentucky Company. The application stated that the Kentucky Company controls the Tennessee Company through ownership of 74.9 per cent of its capital stock; that the Coast Line controls the Kentucky Company through ownership of 35.2 per cent of its common capital stock; and that the Connecticut Company controls the Coast Line through ownership of 28.58 per cent of its common and preferred capital stock. It further stated that the Kentucky Company, the Tennessee Company and the Coast Line were being operated and managed as separate entities.

Hearings were held by an Examiner, resulting in a proposed report, filed June 21, 1956, which recommended the merger. Exceptions were filed by various parties and oral argument held before the full Commission. On March 13, 1957 the Commission released its report and order, both dated March 1, 1957, approving the merger. The order was made effective forty days from date. The complaint in this cause seeking to enjoin, set aside and annul the order was filed March 29, 1957. The complaint, as amended, and the intervening complaints, as amended, alleged that the order was invalid on the various grounds reflected in the "Questions Presented" heretofore enumerated. Answers were duly filed and the case tried on the record, oral stipulations and statements of counsel in open court, and one exhibit filed by the plaintiff consisting of copy of an application filed July 6, 1956, by Mercantile-Safe Deposit & Trust Company of Baltimore with the Commission in Finance Docket No. 19261, involving application of the Coast Line and the Connecticut Company under Section 5(2) of the Interstate Commerce Act for authority to purchase the properties of the Florida East Coast Railway Company. This document, verified by Thomas B. Butler, President, who is also a director of the Kentucky Company, states that said Mercantile-Safe Deposit & Trust Company, as sole Trustee under various trusts, holds a majority of the voting stock of the Connecticut Company. Mercantile-Safe Deposit & Trust Company did not join in the application in the instant proceeding. The effect of the proposed merger, if consummated, would be the acquisition of control of the Tennessee Company by Mercantile-Safe Deposit & Trust Company. See *Alleghany Corporation* v. *Breswick & Co.*, decided April 22, 1957.

The District Court filed "Findings of Fact[3] and Conclusions of Law" but rendered no opinion discussing the questions presented by the complaint and again presented on this appeal. Conclusion of Law No. 5 makes the blanket statement that the Commission's "findings are supported by substantial evidence" and that they "constitute a sufficient basis for the order." Conclusion of Law No. 6 suggests that the Court deferred to the Commission as a "body of experts." The Court concluded that no ground had been shown which would "justify an order annulling, vacating or setting aside the order of the Commission." Conclusion of Law No. 10.

Without attempting to reconcile the apparent inconsistency, the District Court stated, however, that its approval of the Commission's order was "based upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment." Presumably the Court's reasoning was that without this protection for N. & C. employees, the merger is not consistent with the public interest under Section 5(2)(*c*) of the Interstate Commerce Act. The Commission's order did not contain the "express condition" upon which the Court sustained it. Nevertheless the Court dismissed the complaint.

The comments which follow relate, by their respective numbers, to the "Questions Presented"

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[3] Rule 52(a), Federal Rules of Civil Procedure, would appear inapplicable because there was no trial "on the facts." It has been so held by several courts. See *Illinois* v. *United States*, (D. C. Ill., 1956) 146 F. Supp. 195, 202, and cases cited.

heretofore stated. While it is submitted that all of said questions are substantial, discussion will be abbreviated of those which, while important to the decision of the instant case, are not of the same public importance as the questions discussed at greater length.

THE QUESTIONS ARE SUBSTANTIAL

QUESTION 1

Was the transportation policy of Congress correctly interpreted?

In *McLean Trucking Co.* v. *United States*, (1944) 321 U. S. 67, the Court considered the policy of Congress with respect to consolidations of motor carriers. After quoting from the "national transportation policy" (preamble to Transportation Act of 1940), the Court said (p. 86):

> ". . . The preservation of independent and competing motor carriers unquestionably has bearing on those ends."[4]

The Court has not, since the enactment of the Transportation Act of 1940, interpreted the policy of Congress with respect to the conditions under which voluntary mergers of rail carriers should be approved. In the instant case, the Commission expressed its

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[4] Present day motor carrier mergers are comparable with railroad mergers of the 19th Century. The present Tennessee Company is a consolidation of more than twenty original companies and the present Kentucky Company is a consolidation of more than fifty original companies. See Appendix A and Appendix B, *In Re: Financial Relations, Rates and Practices of the Louisville & Nashville Railroad Company, The Nashville, Chattanooga & St. Louis Railway and Other Carriers*, 33 I.C.C. 168.

understanding of the policy of Congress as follows (Sheets 38-39):

> "Nashville interveners in opposition contend that in the usual case where a merger will result in better use of transportation facilities, two weak roads are being merged to make a strong one, or a weak road is being merged into a strong one, and that such is not the case here, because the Tennessee Company is not a weak railroad nor does the Kentucky Company need strengthening. The provisions of section 5 (2) of the act do not contemplate the unification of only those railroads which no longer can continue under separate ownership. The purpose of the law is to *foster and promote* the voluntary union of carriers into a sound and adequate transportation system for the future, and such union is permissible if it is otherwise consistent with the public interest. *Detroit, T. & I. R. Co. Contrl.*, 275 I.C.C. 455, 489." (Emphasis supplied).

The Commission did not question the premise that the N. & C. is not a weak railroad. The Commission had previously said (Sheet 12):

> "Aided by a strategic location, progressive management, and a large investment in capital improvements, the Tennessee Company is an important carrier of long-distance interchanged traffic and with [unusual] effective solicitation and personalized service it has developed a large and profitable volume of such overhead business. Under its [able] management, the Tennessee Company's operating income per mile of road increased steadily from $1,420 in 1946 to $4,484 in 1954, and the corresponding figures for net income show an increase from $257 to $3,117."[5]

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[5] The words in brackets were in the Examiner's report but were elided in the Commission's report.

With respect to the effects of the merger, the Commission said (Sheet 70):

> "Combining the facilities and resources of the Kentucky Company and the Tennessee Company under one management would give better control of mounting operating costs and enable the surviving company to meet more effectively competition from other modes of transportation. The anticipated accomplishments from the merger would give assurance of a stronger and financially more stable railroad."

The Commission's statement that the "anticipated" accomplishments from the merger "would give assurance" of a stronger and financially more stable railroad is an inference or conclusion from an assumed premise, implying almost that the L. & N., after absorbing the N. & C., will be stronger and financially more stable than it is now. The Commission felt that this prospect justified the merger because the L. & N. could then compete more effectively with "other modes of transportation." We submit that the Commission's conception of the present national transportation policy is erroneous. Whatever may have been the pre-1940 policy, Congress is now equally concerned (1) with preserving other modes of transportation, and (2) with preserving independent and competing units in all of them.

The Commission's interpretation of the policy of Congress was found here to justify not merely the merger of two strong railroads, each of which is big enough to be operated at top efficiency,* but two rail-

* Vice President Parsons of the Kentucky Company quickly conceded on cross-examination, without qualification, that the Tennessee Company is "big enough to be operated at top efficiency."

roads which are naturally competitive rather than complementary. In *Gulf, Mobile & Ohio Railroad Company Purchase, Securities, Etc.*, 261 I.C.C. 405, the Commission said (p. 429):

> "The complementary relationship of the Gulf, Mobile & Ohio and Alton systems lies in the fact that the northern terminus of one is a southern terminus of the other. Purchase of the Alton's properties by the applicant will have the effect of extending the latter's system to Chicago and to Kansas City."

In the instant case the relationship is completely different, as will be later seen.

The Commission's interpretation of the policy of Congress induced it to approve this merger in spite of the fact stated by the Commission as follows (Sheet 69): "From the record it does not appear that the applicants contemplate that any immediate and direct improvement in service will result from the merger."[7] This statement of the Commission, compelled as the result of admissions on cross-examination of applicants' witnesses (Tr. 123, 249-250, 397-398,

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(Tr. 400). In his concurring opinion in *Consolidation of Railroads*, 159 I.C.C. 522, at p. 526, Commissioner Eastman said:

> "There are strong grounds for belief that the best results in operating efficiency and service are secured when a railroad system is small enough so that the executive can maintain something like personal contact with the employees all down the line and also with the shippers in the territory served."

A recent authoritative statement is that of Secretary of Defense Wilson, who referred to the dangers of the "concentration of stupidity" as an argument in favor of decentralization of authority in a business enterprise such as General Motors. Time, June 3, 1957, p. 13.

[7] The Commission said that "nevertheless" the merger "should, in the long run, result in improvement of the service." See discussion under Questions 6 and 7.

402-405); is in direct contrast with the averment in the application: "The reason for the proposed merger is to provide improvements in public service . . ." (p. 31), and with the averment: "The proposed merger would continue the transportation service which the two lines are offering to the public, but it would be more coordinated, economical, efficient, and expeditious service to the public." (p. 33).

The language of the Commission in the instant case, when considered in the context of the facts, means that any two connecting railroads should automatically be given permission to merge if they wish to do so, provided no other carrier objects and there is no alternative proposal under consideration. The arguments in favor of the present merger could be advanced in favor of any such railroad consolidation plan. Advantages to the public in any merger of connecting lines are assumed to be inherent. If such is the policy of Congress, is it also the policy of Congress to create motor carrier, barge, and air line monopolies to compete with the rail monopolies?

If reasonable and substantial doubt exists as to the interpretation of the policy of Congress, the more prudent course would be, we submit, for the Court to resolve the doubt against a merger of this character. Congress may amend the law to correct the error, if one is committed, and to make it plain that its policy is to foster and promote mergers of strong railroads, and to eliminate actual and potential competition between them, so that competition with other modes of transportation can be more effectively met.[8] But once

[8] H. R. 2142, introduced by Representative Celler, Chairman of the House Judiciary Committee, January 8, 1957, is based on the theory that "Rulings by administrative bodies and judicial deci-

a merger of this character is accomplished, the *status quo* cannot easily be restored. Cf. *Alleghany Corporation* v. *Breswick & Co.*, decided April 22, 1957, pointing out that "A merger is the ultimate in one company obtaining control of another" and referring to La Fontaine's fable of the crow, the cheese, and the fox, as demonstrating that "there is a substantial difference between holding a piece of cheese in the beak and putting it in the stomach."

QUESTION 2

Does the record show the existence of an unlawful combination in restraint of trade between the two railroads, and if so, is such violation of the Sherman Act a proper consideration?

Appellees have not questioned the fact that continuously since 1880, when the L. & N. acquired most of the 74.9 per cent of the capital stock of the N. & C. now owned by it, the latter's competition has been restricted or suppressed through the use of this stock control. Indeed the applicants went so far in their brief before the Commission as to say (p. 24): "Whatever competition existed between the two railroads was destroyed in 1880 and cannot again be destroyed by the proposed merger." The background of this assertion was the contention by interveners in opposition to the merger that in fact a substantial amount of competition between the two railroads still existed, especially with respect to solicitation and service, and that the elimination of even this limited competition was contrary to the public interest.

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sions have unduly expanded authorized exceptions from the antitrust laws." (Press release, January 7, 1957, by Representative Celler). An identical bill was subsequently introduced in the Senate by Senator Kefauver, Chairman of the Antitrust and Monopoly Subcommittee. See Appendix C for the bill in full and excerpts from Representative Celler's press release.

Again, in their reply to the exceptions to the proposed report of the Examiner filed by the City of Nashville, et al., the applicants said (p. 49):

> ". . . Competition, except in the 'salesman' sense, just does not exist. Witness Tilford related the policy under which the two properties were operated and pointed out that insofar as competition between the two companies was concerned, there was only 'salesman activity.'"

The contention of the railroads has been that the alleged destruction of competition in 1880 makes lawful the continuing destruction of this same competition from the date of the Sherman Act down to the present time. The District Court apparently accepted this contention in Conclusion of Law No. 8. The Court did not cite or attempt to distinguish the authorities to the contrary urged upon the Court by appellants.[9]

The word "destruction" when applied to competition does not necessarily mean that potential competition is also destroyed. Destruction of competition can be a continuing thing. "Suppression" or "restriction" would, perhaps, be better words. What we have here is a continuing combination in restraint of trade which was not unlawful in 1880 because there was no Sherman Act, but which is unlawful today and has been unlawful since the enactment of that statute. The Sherman Act has no implied "grandfather's clause." The first Sherman Act case decided by this Court involving railroads was *United States* v. *Freight Association,* (1897) 166 U. S. 290. There the combination found to be illegal had been formed before the

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[9] Several of the applicable decisions were referred to in the complaint itself, Paragraph 6.

enactment of the Sherman Act. Nevertheless, it was held to be illegal and was dissolved. Cf. *United States* v. *Southern Pacific Company*, (1922) 259 U. S. 214, 234; *Norfolk Southern Bus Corporation* v. *Virginia Dare Transportation Co.*, (C.A. 4, 1947), 159 F. 2d 306.

In *New York, Chicago & St. Louis Railroad Company Control*, Docket No. 17,883, decided October 7, 1955, the Interstate Commerce Commission said that "competition exists in the meaning of Section 5 at any time that there is such an election of routes as may have an influence upon service or rates." A large number of routes of these two railroads would afford competition if such competition were not forcibly and artificially suppressed. The Interstate Commerce Commission, in a report to the United States Senate in 1915, *In Re: Financial Relations, Rates and Practices of the Louisville & Nashville Railroad Company, The Nashville, Chattanooga & St. Louis Railway and Other Carriers*, 33 I.C.C. 168, said, in answer to Questions 3 and 4 propounded by the United States Senate:

> "The Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway, with their respective connections, each form complete through routes between Mississippi and Ohio River crossings on the one hand and southern and eastern territory on the other; also between Nashville and southeastern territory; also between eastern points on the one hand and the Mississippi Valley, the west, northwest, and southwest on the other. Through routes which may be formed by each between the principal gateways are independent of those which may be formed by the other. In other words, the geographical relations of these two systems are such that were they separately controlled competition between them

would be the inevitable result. As will be shown below, the official records of these carriers clearly establish that the purchase of control of the Nashville, Chattanooga & St. Louis Railway by the Louisville & Nashville Railroad Company was primarily for the purpose of restricting competition and to maintain rates."

It is clear that the two railroads are potentially competitive. In *United States* v. *Aluminum Company of America,* (C. A. 2, 1945), 148 F. 2d 416, 429, the Court held that it makes no difference in a Sherman Act case whether existing competition is terminated or whether prospective competition is prevented. That same principle is applicable here. And it is no defense that corporations accused of conspiring to restrain trade have a common ownership. *United States* v. *Yellow Cab Co.,* (1947) 332 U. S. 218; *Kiefer-Stewart Co.* v. *Seagram & Sons,* (1951) 340 U. S. 211, 215; *Timken Co.* v. *United States,* (1951) 341 U. S. 593, 598. On the other hand, it is perfectly possible for corporations to compete where stock affiliation exists. In *Pennsylvania R. Co.* v. *Interstate Commerce Commission,* (C. A. 3, 1933) 66 F. 2d 37, the Court exonerated the Pennsylvania Railroad Company from violating the Clayton Act by purchasing the stock of the Lehigh Valley Railroad Company and the Wabash Railroad Company, where the evidence was that the stock had been purchased solely for investment, and that competition had not been substantially lessened between the companies.

The appellees consistently refused, both before the Commission and the District Court, to face this issue. So that there may be no question as to what the issue is, we emphasize that we do *not* contend either that

the acquisition of the N. & C. stock by the L. & N. was illegal or that its continued ownership is *per se* illegal. The illegality derives from the use of the stock ownership to maintain a combination in restraint of trade whereby the competition of the N. & C. is restricted and suppressed.[10]

The question remains whether or not this continuing violation of the Sherman Act by the two railroads here involved has any relevancy. The Commission has power to approve, as consistent with the public interest, the control of one railroad by another for the purpose of eliminating competition where there are countervailing advantages to the public interest. The Commission has never approved the suppression or restriction of the N. & C.'s competition by the L. & N. What the Commission has done here is to approve the second step of a merger as being consistent with the public interest, without having approved the first step; and in approving the merger, the Commission stated that the competitive situation was to be viewed as "different from a situation involving wholly independent carriers" (Sheet 44) and that there was disclosed in the record "no important effect from the elimination of such competition as now exists." (Sheet 47). Based on these premises, the Commission found that "the reduction in competition resulting from the merger would be consistent with the public interest." (Sheet 47).

An analogous situation was involved in the *Southern Pacific* case, above cited. The Southern Pacific had

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[10] *United States* v. *E. I. du Pont de Nemours & Co.*, decided June 3, 1957, is authority for the proposition that even where the acquisition of stock was lawful, its subsequent use may violate the Clayton Act. *A fortiori*, it may violate the Sherman Act.

leased the lines of the Central Pacific and destroyed its competition before the enactment of the Sherman Act. After its enactment, the Southern Pacific acquired the stock of the Central Pacific. The Court said (259 U. S. 233):

> "We cannot accept the theory of prior practical consolidation as a justification for a violation of the Sherman Act resulting from the stock control acquired in 1899."

The Commission itself, in cases involving motor carriers, has adopted substantially the position which we advocate here and which we believe to be the correct application of the philosophy of the *McLean Trucking* decision. The Commission has held that the second step of approving a merger cannot be taken without also taking the first step of approving, and thereby legalizing, an existing unlawful situation. For example, in *Cortland Fast Freight, Inc.—Purchase—H. J. Korten, Inc.*, 60 M.C.C. 321 (1954), the Commission said, in rejecting a merger application:

> "In effect, applicants would have us ignore the unlawful control which has now continued for some years, and authorize the merger on the basis of the evidence presented, which is largely based on the unlawful control and the operations thereunder and directed primarily to the merger. The real issue is whether common control of these carriers should be sanctioned under the circumstances presented. In our opinion, this record shows such a flagrant disregard for the law that divestiture should be ordered."

The unlawfulness in that case derived from Section 5(4) of the Interstate Commerce Act. The principle is the same here, where the unlawfulness derives from

the Sherman Act. In considering whether this merger should be authorized as consistent with the public interest, the proper comparison is between the competitive situation which will exist after the merger and the competitive situation which *would* exist without a merger if there was no *unlawful* suppression of competition. The Commission has the power in a proper case to relieve a carrier from the antitrust laws, as was done in *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508, after this Court had held that the Sherman Act had been violated. But in the instant case the Commission refused to consider the Sherman Act question.

Why the Commission rejected appellants' contention on this issue does not clearly appear in its report. Appellees sought in the District Court to justify the rejection on the theory that the Commission is not concerned with the enforcement of the Sherman Act. Nevertheless, the Sherman Act is a part of the transportation policy of Congress.[11] "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

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[11] The Commission itself has recognized that this is true, saying, in *Chesapeake & O. Ry. Co. Purchase*, 271 I.C.C. 5, 43, that "The policy of Congress is to be found not only in the consolidation provisions of the Interstate Commerce Act, but also in the antitrust acts." See also: "A Critique of: 'The Marasmus of The ICC: The Commission, The Railroads, and The Public Interest' ", 62 Yale Law Journal 171, by Charles S. Morgan, a member of the Interstate Commerce Commission staff, where the author comments (p. 200) on the Commission's "devotion to the principle of maintaining competition in the public interest."

Southern Steamship Co. v. National Labor Relations Board, (1942) 316 U. S. 31, 47.

This proposed merger would make permanent, but without any finding of the Commission that it is consistent with the public interest to do so, the restriction of competition accomplished in 1880 and maintained consistently since that time, as well as the additional reduction in competition which will directly result from the merger. The conclusion of the Commission that there was disclosed "no important effect from the termination of such competition as now exists" (Sheet 47) was the result of treating the existing situation as a *fait accompli* and refusing to question its lawfulness under the Sherman Act. We submit that this was an error of law on the part of the Commission, and that the District Court also erred in dismissing the question from consideration on the theory that there had been no showing of any violation of the antitrust laws. Finding of Fact No. 11 itself discloses such violation..

In two relatively unimportant respects the Commission intimated that it had given consideration to hypothetical situations. The restriction of the N. & C.'s competition by the L. & N. was formerly implemented, in part, by a written solicitation and routing agreement between the two railroads which was formally terminated before the report of the Commission, as was disclosed in the oral argument. (Tr. 1704). The Commission said (Sheets 42-43) that it had given consideration "to the possibility that the agreement might be nullified and competition between the railroads, if continued as separate entities, thereby increased, and to the fact that the possibility that such competition will be eliminated by the merger."

The solicitation and routing agreement was, however, merely evidence of the combination. Competition would not be restored by the abrogation of the written agreement, without more, and the "possibility" referred to was unreal.

Secondly, the Commission said that the advantages to the public interest from the merger outweighed the disadvantage to the single locality of Nashville, "even approaching this problem from the standpoint that the applicants are truly competitive." (Sheet 69). It is not clear what the Commission meant by this statement, after having held that they were not truly competitive. It is clear, however, that, aside from the effect on Nashville, the Commission considered only the effect on the public interest from the elimination of "such competition as now exists" without considering at all the competitive situation which would exist if the L. & N.'s relation to the N. & C. were comparable, for example, to the Pennsylvania's relation to the Wabash. *Pennsylvania R. Co.* v. *Interstate Commerce Commission, supra.*

We submit that the Commission's order was invalid because the Commission did not consider the disadvantage to the public from the elimination of the potential competition which would become an actuality if the two railroads were to cease violation of the Sherman Act; and that the District Court was in error in pretermitting the question on the theory that there was no showing of such violation.

QUESTION 3

Was Section 5(2)(c) of the Interstate Commerce Act correctly interpreted in connection with "the interest of the carrier employees affected," and should the District Court have dismissed the complaint after refusing to approve the Commission's order except upon an "express condition" which was not in the order?

In *Fort Worth & D. C. Ry. Co. Lease*, 247 I.C.C. 119, the Commission said, calling attention to the amendments made by the Transportation Act of 1940, (p. 127):

> "Railroad organization consists of four important and indispensable factors, namely, land, labor, capital and management. High specialization is necessary for each railroad factor. Whenever expert railroad labor is compelled to readjust and adapt itself to another industry, there is substantial loss to the individuals and to the general public. Congress has recognized this fact and in revising the statute has specifically required us to give consideration to 'the interest of the carrier employees affected.' Heretofore, we have given consideration to the interest of the carrier employees affected to the extent of imposing appropriate conditions in our order of approval. See *Chicago, R. I. & G. Ry Co., Trustees Lease*, 233 I. C. C. 21. We are now specifically required to give consideration to the interest of such employees in determining whether the transaction is consistent with the public interest. Under the proposed lease the future of any individual employee of the lessor would be uncertain.
>
> "Applicant contends that the proposed transaction is consistent with the public interest because of the savings that would result from the consolidation of shops and the dismissal of employees. Under the amended act it is obvious that the savings would be insignificant during the

period in which the employees would be protected by the provisions of our order complying with subparagraph (f). In other words, we are asked to give approval to this transaction based entirely on what the applicant believes will be the situation 4 or 5 years hence.

"Part of the alleged savings can be attained by modification of the reciprocal arrangement between the Burlington and the parties hereto, irrespective of our conclusion herein. The amount of future savings is uncertain and problematical. No present advantage in the public interest is shown."

The transaction in the *Fort Worth* case was disapproved for the reasons indicated in the foregoing paragraphs of the opinion. The Commission in the instant case distinguished the *Fort Worth* case on the sole ground that "initial control was to be attained" in that case "by a lease rather than a merger of properties which have been controlled by the dominant company, through stock ownership, for more than 75 years" (Sheet 65). In so doing, the Commission adopted identical language from the Examiner's proposed report, giving no reasons for overruling exceptions based on the contention that this was a distinction without a difference. Why the Commission overruled the exceptions is not clear, but whatever the reason, we submit that the Commission erred in not following its own precedent, which was a correct application of Section 5(2)(e).

The intervening railroads have contended that the *Fort Worth* case was wrongly decided, even if not distingnishable. The Commission did not say so. "The grounds upon which an administrative order must be judged are those upon which the record discloses that

its action was based." *Securities & Exchange Commission* v. *Chenery Corp.*, (1943) 318 U. S. 80, 87. We do not know how the Commission would have disposed of this issue if it had accepted the contention of the railroads that, in effect, item (4) of Section 5(2)(c) should be elided on the theory that compliance with Section 5(2)(f) makes it unnecessary to consider the interest of the employees under Section 5(2)(c). But it seems too clear for serious question that (f) did not repeal (c). Protective conditions under (f) may reduce, but not altogether eliminate, the disadvantages to be weighed under (c).

The District Court did not sustain the order of the Commission, as written, being of the opinion that the merger is not consistent with the public interest unless the rights of N. & C. employees are protected equally with the rights of L. & N. employees as respects seniority and other conditions of employment. (Conclusion of Law No. 11). In the absence of such a condition, the disadvantages to the public outweigh the advantages. But the Commission did not consider that there was *any* disadvantage to be considered under (c), after having imposed protective conditions under (f) which the District Court regarded as inadequate. Thus, the District Court disagreed with the Commission's interpretation. Nevertheless the District Court dismissed the complaint.

We submit that it is entirely clear that the District Court, instead of dismissing the complaint, should have issued the injunction prayed for. As said in *F. P. C.* v. *Idaho Power Company*, (1952) 344 U. S. 17, 20, "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration."

QUESTION 4

Were prejudicial procedural errors committed by the Commission in declining to issue a subpoena duces tecum and in unduly restricting cross-examination?

The application alleged (p. 31): "Investigations and studies of the operations of the two railroads disclose that by being operated under one management and control, the merged properties could produce transportation service more efficiently and economically than can be produced by operation of the properties under separate companies and managements." The application was verified by officers of the applicants, but the verification by the president of the Tennessee Company, W. S. Hackworth, contained this express exception: ". . . not including the statement of the economies and other advantages which would result from the proposed merger, such statements being those of other applicants based on studies conducted by them, . . ." (p. 58).

Interveners in opposition to the merger filed a petition with the Commission well in advance of the hearings asking, among other things, for the issuance of a *subpoena duces tecum* for the president of the Kentucky Company, requiring that he bring with him to the first hearing "a true copy of all reports of investigations in the files of applicant, Louisville & Nashville Railroad Company, and all studies of the operations of the two applicants which were given consideration in deciding on the proposed merger, and all correspondence relating thereto between the applicants." Division 4 of the Commission entered an order declining to issue this subpoena and in the final report of the Commission it was held that no error had been committed, the Commission stating

(Sheet 5): "The issuance of a subpoena is not a matter of right, in the absence of a showing of general relevance and reasonable scope of the evidence sought, . . ."

The president of the Kentucky Company, Mr. Tilford, testified at the hearings (Tr. 233) that the decision to merge was based on the studies in question. They included studies relating to the effect of the merger on revenues from freight traffic (Tr. 231-234), and a study with respect to how transportation service could be more effieiently produced (Tr. 235). When Mr. Tilford was asked to produce these studies, counsel for the L. & N. objected and the Examiner excluded the evidence. (Tr. 234-236)

Although the studies were excluded, it was later proved by testimony of Mr. W. K. Tate, former vice president in charge of traffic for the Tennessee Company, who held a similar position at the time of the hearings with the New York, New Haven & Hartford Railroad Company, that the original Kentucky Company traffic study estimated that more than $3,800,000 of freight traffic would be lost as the result of the merger, while Mr. Tate himself estimated a slightly smaller loss. (Tr. 1177-1180). The Kentucky Company witnesses testified, however, that their *final* judgment was that there would be no losses. (Tr. 115-116, 157-160, 1591-1598). Since traffic losses of the magnitude originally estimated would more than absorb any gross savings, and since the differing opinions on this subject could not be appraised without knowing the reasons for the opinions, the Commission should have been interested in the reasons given in the original Kentucky Company traffic study, which its counsel refused to produce. The reason-

ing might well have corroborated Mr. Tate's reasoning which he lucidly explained both on direct examination (Tr. 1180-1187) and on cross-examination (Tr. 1214-1225).

The Examiner's reasons for this and similar rulings were stated as follows in his proposed report (Sheets 70-71):

> "The Nashville interests continue to rely upon exceptions taken at the hearings in connection with the rulings of the examiner refusing to require the submission of additional information by the applicants. As in all applications filed under section 5(2) of the act, the burden of proof is on the applicants herein, and it is their responsibility to decide, at their own risk, the nature and kind of evidence to be presented in support of the application. The information called for in the Commission's order dated October 14, 1940, with respect to such applications, may be used to guide the applicants in the matter. The applicants herein have complied with that order, and have submitted ample evidence sufficient and adequate to sustain the material allegations contained in the application. The studies and reports made by the freight traffic manager of the Kentucky Company, upon which the interveners in opposition so heavily rely, were not included as part of the applicants' case and need not be considered herein. . . ."[12]

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[12] Mr. Tate testified that the first study estimated a gross loss of $3,865,887 (Tr. 1179), but in arriving at net loss there was erroneously applied the operating ratio of the Kentucky Company instead of merely deducting the out-of-pocket transportation expense, with the result that the study showed a net loss of only $601,408 after federal income taxes. The second and third reports or studies estimated progressively lower losses.

The full Commission approved the rulings of the Examiner, but with respect to the traffic studies added the statement (Sheet 71) that "extensive testimony with respect thereto was presented by interveners in opposition through the former vice president in charge of traffic for the Tennessee Company." The District Court held that if error was committed, it was non-prejudicial for this reason. It is true that this testimony gave the final figures in each of the studies; but since the studies themselves were excluded, neither the Examiner nor the Commission had the benefit of the reasons for the estimates, and could not compare them with the reasons given by Mr. Tate in support of his estimate. The result was that the Commission based its order on the assumption that there would be no traffic losses as the result of the merger.

The Examiner also excluded, on objection by applicants' counsel, figures called for on cross-examination to test the validity of other opinions expressed by Kentucky Company officers. The procedural theory was the same, viz., that since the burden of proof was on the applicants, it was their responsibility to decide at their own risk, the nature and kind of evidence to be presented. It is submitted that this theory would have supported a rejection of the application, but cannot support its approval.

One issue with respect to which cross-examination was unreasonably restricted was that of the gross savings and economies to be accomplished by the merger. It was undisputed that some savings and economies can be effected in any merger of connecting railroads from avoidance of "duplications of accounting, reporting, etc., between carriers and to regulatory authorities." (Sheet 70). It was also undisputed that

certain savings and economies could be effected by joint arrangements of a character which could also, however, be effected without a corporate merger. But applicants further contended that numerous employees could be eliminated by consolidating certain departments of the two railroads, such as the engineering department and the accounting department. The interveners contended that this could not be done without loss of efficiency *unless* these departments were *already* overstaffed.

For example, the head of the L. & N. accounting department testified that his department could take over the accounting work of the N. & C. with very little increase in personnel because the L. & N.'s accounting department was large enough to utilize machine accounting to advantage and the N. & C. accounting department was not. An indication of the trustworthiness or untrustworthiness of this statement would have been afforded by the employment figures of each of the two departments before machine accounting was installed, as compared with corresponding figures at the time of the hearing. The Examiner, however, refused to permit such figures to go into the record after counsel for the L. & N. stated that they were "unwilling" to furnish them. (Tr. 506-507, 834).

In Conclusion of Law No. 7(b), the District Court apparently adopted the theory of the railroads that this restriction on cross-examination was not prejudicial because the head of the L. & N. accounting department was present as a witness and was ready to testify as to whether or not his department was overstaffed. But counsel for interveners wished to obtain the figures,—not to ask an adverse witness for his conclusion or opinion, and certainly not to ask him

questions suggested by counsel for the railroads who introduced him as a witness. The error was clearly prejudicial, because counsel for interveners were prevented from exposing the lack of basis for applicants' claim.

The Examiner in his proposed report, and the Commission in its report (Sheet 52), accepted without question the contentions of applicants that savings of the character above referred to will be effected without loss in efficiency. If errors were committed in restricting cross-examination, as was done, the errors were prejudicial, as the result demonstrates. The Commission, after adopting the theory that applicants could decide for themselves what evidence to produce and what evidence to withhold, had little basis on which to reject applicants' estimates of gross savings. The ultimate conclusion that the merger is consistent with the public interest rests almost entirely on these estimated savings, together with inferences based thereon to the effect that greater efficiency and financial stability will result, which should enhance the adequacy of the service, etc.

The same theory was applied by the Examiner and approved by the Commission and by the District Court in connection with attempted cross-examination of applicants' witnesses with respect to the effect of a 1951 order by the L. & N. to the N. & C. to discontinue solicitation of traffic moving between Cincinnati and beyond and Atlanta and beyond. (Exhibit H-73). As the result of the L. & N. action, traffic which N. & C. solicitors were formerly able to move over the L. & N. to Nashville and from Nashville to Atlanta and vice versa, was now to be moved over the L. & N. route

through Knoxville. The actual effect of this order could have been seen by comparing the interchange figures between the two railroads at Nashville in the years 1951 through 1954 and observing the trend. Mr. Tilford was asked on cross-examination to furnish the interchange figures. Applicants contended that the effect on traffic was insignificant. They agreed to supply the figures for 1953 and 1954, but objected to supplying them for 1951 and 1952 on the ground that the figures were not "important enough to cause them that much trouble." (Tr. 233). The Examiner sustained the objection, and the District Court, in Conclusion of Law No. 7(e), apparently approved the Commission's action in overruling the exception to the Examiner's ruling on the theory that it was not necessary to require 1951 and 1952 figures because the applicants were willing to furnish the 1953 and 1954 figures. But the whole purpose of asking for the figures was to make a comparison and to indicate the trend. The 1953 and 1954 figures alone were worthless.

Section 5(2) of the Interstate Commerce Act provides in subparagraph (b) that the Commission "shall afford reasonable opportunities for interested parties to be heard." Title 5, U. S. Code, Section 1006(c), authorizes interveners "to conduct such cross-examination as may be required for a full and true disclosure of the facts." We submit that Congress intended a proceeding of this character to be conducted as an adversary proceeding and not as an *ex parte* proceeding. The refusal to issue the requested subpoena violated Title 5, U. S. Code, Section 1005(c). This error was compounded when the Examiner sustained the objections made by applicants to reasonable and proper cross-examination of their witnesses.

An order cannot be sustained where there is undue restriction on the right to cross-examine. *Reilly* v. *Pinkus*, (1949) 338 U. S. 269.

In his dissenting opinion in *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 176, Mr. Justice Stone said:

> "The suggestion that an appropriate hearing upon evidence may be dispensed with because the rejected evidence would not have materially affected the outcome, seems to be based either on the assumption that the Board has in some way passed on the weight of the rejected evidence without hearing it, or that the Court is now free to appraise it and perform the function which the Board neglected to perform. Neither position is tenable. . . ."

And again (p. 177):

> "'One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion, is that it cannot rightly exclude from consideration facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion. *Interstate Commerce Commission* v. *Chicago, R.I. & P. Ry. Co.*, 218 U. S. 88, 102; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 75, 78; *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, 304, 305."

It is believed that the foregoing philosophy is embodied in the Administrative Procedure Act. It was not observed in the proceeding before the Commission, and the District Court erred in failing to "hold unlawful and set aside" the action of the Commission

because it was "without observance of procedure required by law" after taking "due account of the rule of prejudicial error." (Title 5, U. S. Code, Section 1009(e)).

QUESTION 5

Did the District Court give full scope to its responsibilities with respect to judicial review?

The Administrative Procedure Act, Title 5, U. S. Code, Section 1009(e), requires the reviewing court to decide all relevant questions of law and to interpret statutory provisions. While the Commission must necessarily in the first instance interpret the law, it is the function of the Court not to defer to the Commission's interpretation, but to decide whether the Commission's interpretation is correct or incorrect.[13]

In Conclusion of Law No. 6 the District Court states: "An order of the Interstate Commerce Commission is entitled to great respect, representing as it does the opinion of a body of experts upon matters within the range of their special knowledge and experience," *Universal Camera Corp.* v. *National Labor Relations Board*, (1951) 340 U. S. 474, 488, is cited, as well as numerous cases decided before the enact-

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[13] In "Judicial Review: Question of Law," 69 Harvard Law Review 239, 269, Professor Louis L. Jaffe says: "The expert judgment is rarely 'pure,' rarely determined solely by the criteria in its field. In most cases the administrative action will be as much determined by power drives and legal attitudes as it is by technical considerations." See also "Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility," 67 Harvard Law Review 436, 448-9, where Professor Louis B. Schwartz says: "Is there an 'expertise' on the question of the relative importance of preserving competition which should induce judges to defer to commissioners? Or is this a question of general political and economic philosophy?"

ment of the Administrative Procedure Act and before the *Universal Camera* decision. In the instant case, the errors of law relied upon do not relate to matters of discretion within the special knowledge and experience of the Commission. They relate to the interpretation of the law, the procedure which was observed, and whether or not the Commission observed legal requirements in considering and weighing the evidence. In view of the fact that the *Universal Camera* decision was urged upon the District Court as having enlarged the scope of judicial review, it is significant that in Conclusion of Law No. 5 the Court did not say that, in making its determinations, it had reviewed the whole record, or such portions thereof as had been cited by counsel. Cf. *Radio Corp.* v. *United States*, (1951) 341 U. S. 412, 415.

QUESTIONS 6 AND 7

Did the Commission commit prejudicial errors of law in evaluating the evidence?

In the *McLean Trucking* case the Court interpreted the national transportation policy of Congress as requiring the Commission to consider the "advantages of improved service, safer operation, lower costs, etc.," and compare them with the effects of the curtailment of competition to determine whether the consolidation "will assist in effectuating the over-all transportation policy." As previously noted, the Commission found that no immediate and direct improvement in service is contemplated as the result of the merger.[14] Nevertheless the Commission included in its report several generalities, such as the statement: "On the whole we conclude that the merger would enhance the adequacy

[14] Infra (p. 16).

of service by the merged companies, and would constitute the best use of the facilities"; that "accompanying savings and improved efficiency of operation necessarily would strengthen the applicants, and render them capable of better service"; and that this "should, in the long run, result in improvement of the service which they otherwise would be able to render." (Sheet 69).

These generalities, which are conclusions rather than findings of fact, and were apparently so regarded by the District Court (see its Finding of Fact No. 10, commencing with the words: "The Commission concluded"), are unwarranted inferences from evidence of gross savings which applicants testified would result from the merger. A major portion of these gross savings are to come from the dismissal of employees. (Finding of Fact No. 13). It is obvious that elimination of employees may result in lower efficiency, deterioration of service, and loss of revenues. The following quotation from *Pennsylvania R. Co.* v. *Chamberlain,* (1933) 288 U. S. 333, 339, is pertinent:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of the two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. . . ."

There was positive and uncontradicted evidence that the larger railroad is already less efficient than the smaller with respect to such an important item as the maintenance cost of diesel locomotives. If the L. & N. had maintained its diesels at the same per unit

cost as the N. & C., it would have saved $4,368,972 in the year 1954. (Tr. 394-395). Applicants insisted that the unit cost was not the proper measure of comparison because the L. & N. operated its diesels a greater number of miles than the N. & C., and because of other factors claimed to be unfavorable to the L. & N. It developed, however, that on a unit *mile* basis, the L. & N. cost during the five-year period ending in 1954 was 18.95 cents as compared with 12.91 cents for the N. & C. (Tr. 1549-1555; Exhibit H-62, as corrected). The District Court, in Conclusion of Law No. 7(d), states that the Commission "rejected" the "contention that diesel locomotive repair costs are higher on the Louisville & Nashville than on the Nashville, Chattanooga & St. Louis." If the Commission did reject the contention (which is not entirely clear from the report), it did so without reason or basis, because the evidence was uncontradicted. In view of this evidence, the inference is plainly unwarranted that making the larger railroad still larger would result in greater efficiency.[15]

Conclusion of Law No. 7(d) further states that the Commission "rejected" the contention "that the merger would produce 'poorer' service." This contention, however, was based largely on applicants own evidence. There was evidence that by routing its through trains over the present N. & C. line between Memphis and Bruceton, the L. & N. proposes, after the merger, to convert its line between those points via Jackson into a secondary route and maintain it at lower cost than formerly. (Tr. 355-361). This will mean poorer service to Jackson, and to points served

[15] See footnote 6, p. 15, *infra*.

by lines which connect with the N. & C. at Jackson, an important junction. Through trains will no longer be routed through Jackson and it will no longer be possible to drop off from through trains at Jackson cars destined for Jackson proper or to connecting lines at Jackson, or for through trains to pick up cars at Jackson. (Tr. 1208-1209). Secondly, the L. & N. merely "hoped" to be able to "equal the present service" between Memphis and Nashville after consolidating the freight terminals at Memphis (Tr. 398); and the uncontradicted evidence was that the use of the L. & N. terminal at Memphis (after abandoning the present N. & C. terminal) would entail several hours delay. (Tr. 1206-1207). Thirdly, the applicants propose to abandon a car-ferry across the Tennessee River at Guntersville, Alabama. (Tr. 357). The Commission referred to the savings from these curtailments in service (Sheets 50 and 51), but ignored the poorer service to the public. If the contention was "rejected," we do not find in the report any statement as to the grounds or basis for the rejection.

The report shows that the Commission gave weight as a consideration in favor of the merger to the fact that "the numerous witnesses presented by the applicants overwhelmingly favored the proposed merger" (Sheet 47). It would have been strange, indeed, if the applicants had produced witnesses who did not favor it. The Commission also stated (Sheet 47) that it was "important to note that no other carrier has opposed the merger." (The obvious explanation is that other carriers will benefit by obtaining traffic which the applicants lose, as predicted by Mr. Tate).[16]

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[16] See p. 31, *infra*.

On the other hand, the Commission gave scant attention to the testimony of Benjamin J. Brooks, transportation expert offered by interveners in opposition to the merger, who demonstrated the injury to the public at large because "the best use" of the transportation facilities of the two railroads will not be made if the merger is approved (Tr. 1236-1300); and the Commission failed to consider at all the circumstance that the president of the N. & C. was unable to verify the statements in the application regarding the alleged savings and economies and other advantages from the merger, and that no officer of the N. & C. took the stand to support any of the opinions given by the L. & N. officers. The Commission failed to consider and apply the rule stated, as follows, in *Interstate Circuit, Inc.* v. *United States*, (1938) 306 U. S. 208, 226:

> ". . . The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character. . . ."

The same doctrine is expressed in Wigmore on Evidence, Section 285, as follows:

> "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause."

It would be premature and inappropriate at this stage to elaborate further upon the lack of support in the record for the vague generalities contained in the report of the Commission with respect to efficiency and service. An examination of such portions of the record as have been cited by appellants in the complaint and in their briefs, together with portions cited

by appellees, will reveal clearly that the order was not "supported by and in accordance with the reliable, probative and substantial evidence" in the record, taking into account the fact that the applicants had the burden of proof. (Title 5, U. S. Code, Section 1006(e)). This proposition will be elaborated in appellants' brief if probable jurisdiction is noted.

QUESTION 8

Did the report of the Commission meet the requirements of the Administrative Procedure Act?

The report contains a large amount of background material, and the contentions of the applicants and interveners in opposition on the major issues are stated; but it is difficult to ascertain just which contentions of the applicants are actually accepted, and why. The ultimate findings or conclusions, in the language of the statute, are not based on subsidiary findings that can be easily identified, and for which "the reasons or basis" are stated, as required by Title 5, U. S. Code, Section 1007(b). In the main, the report is merely a verbatim report of the proposed report of the Examiner, followed by the statement (Sheet 71):

> "Exceptions and requested findings not specifically discussed herein, or reflected in our findings or conclusions, have been given consideration and found not justified."

It is impossible to determine from the report just how, where and in what respects the merger "would enhance the adequacy of service by the merged companies and would constitute the best use of the facilities." (Sheet 69). The report "leaves foggy the basis of its conclusions" on all the issues involved in the questions previously discussed. *Secretary of Agriculture* v. *United States*, (1956) 350 U. S. 162, 175.

QUESTION 9

Was the conclusion "that the transaction will be consistent with the public interest" supported by the record?

The reasons for answering this question in the negative have heretofore been summarized.

QUESTION 10

Is it a matter of national concern (assuming that the order is otherwise valid) whether the two railroads "consolidate" under state law, or "merge" under a nonexistent law; and if so, is that issue justiciable in this cause?

The application to the Commission was for an order "approving and authorizing the merger of the properties and franchises of the Nashville, Chattanooga & St. Louis Railway into the Louisville & Nashville Railroad Company . . ." There was filed as Exhibit 7, to the application an "Agreement of Merger" dated December 16, 1954. The agreement provides that the Kentucky Company shall continue to be a corporation organized and existing under the laws of Kentucky, but that the separate corporate existence of the Tennessee Company shall cease. According to this proposed merger agreement, there will no longer be a Tennessee corporation.

The charter of the Nashville, Chattanooga & St. Louis Railway (Acts Tennessee 1845-6, ch. 1), and amendments thereto, which constitute a contract with the State of Tennessee, contain no authorization for such a merger, nor is there any general law of Tennessee which authorizes it. Tennessee Code Sections 65-901 to 65-908, inclusive, expressly authorize consolidations of railroads; and under these sections, and corresponding Kentucky law (KRS 271.465 et seq.) the two railroads could consolidate, and the resulting corporation would be a Kentucky corporation in Ken-

tucky and a Tennessee corporation in Tennessee. Cf. *Memphis, Etc. R.R. Co.* v. *Alabama*, (1882) 107 U. S. 581; *Nashua Railroad* v. *Lowell Railroad*, (1890) 136 U. S. 356; *Town of Bethel* v. *Atlantic Coast Line R. Co.*, (C.A. 4, 1936) 81 F. 2d 60.

There are, of course, important differences between a merger and a consolidation (see *Keokuk & Western Railroad Co.* v. *Missouri*, (1894) 152 U. S. 301; *Akwell Corporation* v. *Eiger*, (D. C. N. Y., 1956) 141 F. Supp. 19). It is well settled that authority for a transaction of this character must be clearly, distinctly and expressly conferred by some express provision of the law. *Knapp* v. *Golden Cross*, (1908) 121 Tenn. 212. The union of the two railroads here involved must take place under Kentucky and Tennessee law. Congress might, had it chosen, have enacted a federal corporation law for interstate carriers, under which they might "consolidate" or "merge"; but Congress disclaimed any such intention in Section 5(11) of the Interstate Commerce Act.

In *Texas* v. *United States*, (1934) 292 U. S. 522, 533, the Court recognized the clear distinction between the supervision of the state "in matters essentially of state concern," and the supervision of the federal government with respect to "operations which in their effect upon interstate commerce are of national concern." In the instant case the Commission made no finding which suggests that, in any degree whatever, it is a matter of national concern for the N. & C. to be *merged* into the L. & N. rather than for the two railroads to *consolidate* into a new corporation. Presumably the Tennessee legislature had valid reasons for authorizing

consolidations but not mergers of this character, involving questions essentially of state concern."[17]

The applicants have themselves suggested no reason for seeking to do something which state law does not permit instead of seeking to accomplish their purpose in conformity with state law. The question was promptly called to the attention of the Commission by a motion to dismiss filed long before the hearings, and applicants had ample opportunity to file a new application, or seek permission to amend their application by substituting a consolidation agreement for the "Agreement of Merger" filed as Exhibit 7 to the application. Instead, they chose to sink or swim on their application to merge the Tennessee Company into the Kentucky Company and not consolidate.

The order of the Interstate Commerce Commission is "permissive and not mandatory." *New York Central Securities Co.* v. *United States,* (1932) 287 U. S. 12, 26. The principle of *Claiborne-Annapolis Ferry* v. *United States;* (1932) 285 U. S. 382, is applicable. In that case the Commission authorized a railroad company to build and operate a ferry. It was contended that the railroad company under its charter had no power to operate a ferry. The Court said (p. 391):

> "Whether the Railway Company has corporate power to operate the proposed ferry is a question which cannot be considered in this proceeding. We think Congress never intended to impose upon the Interstate Commerce Commission the duty of determining matters of this nature before grant-

[17] For example, the method of transferring title to real estate is a matter of state concern. Tennessee has not authorized the N. & C. to transfer its real estate to the L. & N. in the manner proposed.

ing or withholding assent to the construction of an extension. *Cleveland, C., C. & St. L. Ry. Co.* v. *United States*, 275 U. S. 404, 414."

Applying this principle, it would be premature at this stage to rule upon the question whether Section 5(11) of the Interstate Commerce Act constitutes, in substance and effect, an amendment to Sections 65-901 - 65-908 of the Tennessee Code, so as to authorize this proposed merger. We submit our views, however, out of an abundance of caution and to avoid a later contention of *res adjudicata*.

Appellees rely upon *Seaboard Air Line Railroad Co.* v. *Daniel*, (1948) 333 U. S. 118. This was not a suit to annul and set aside an order of the Interstate Commerce Commission. It was a suit brought by the railroad company against the Attorney-General of South Carolina to enjoin him from enforcing against it certain state laws forbidding foreign corporations to own or operate railroads in the state. The Seaboard Air Line had, with the approval of the Interstate Commerce Commission, succeeded to the ownership and operation of a railroad system with lines traversing South Carolina. The Commission's report contained a finding that compliance with the South Carolina railroad corporation laws would result in "substantial delay and needless expense," and the order affirmatively authorized the railroad company, a Virginia corporation, to own and operate the South Carolina properties without complying with the South Carolina railroad corporation laws. The Court held that this order of the Commission was authorized by Section 5(11) of the Interstate Commerce Act and was valid.

In the instant case there is no finding by the Commission or by the District Court, and indeed no contention, that a consolidation could not be accomplished

with the same speed and with as little expense as a merger. No prohibitory state law is involved. As to procedure, the *Seaboard Air Line* case supports the position here taken that a separate action is necessary to determine the issue. If and when the railroads are ready to tender their merger agreement to the Secretary of State of Tennessee for filing and recording, they can bring an action in which they can insist upon the position here taken and obtain a declaratory judgment.

If, however, the Court should be of the opinion that a justiciable question is properly raised in this proceeding, and is not premature, we insist that Congress had no intention of amending Sections 65-901 - 65-908 of the Tennessee Code, or granting power to do so to the Interstate Commerce Commission, so as to authorize a merger of this character; but that if Congress did have such intention, and if Section 5(11) of the Interstate Commerce Act be so construed, then it violates the Tenth Amendment. On this question, *Hopkins Savings Association* v. *Cleary,* (1935) 296 U. S. 315, is believed to be directly in point.

Conclusions of Law Nos. 3 and 4 do not meet the issue here presented. The District Court concluded that the Commission was empowered to authorize the merger of the N. & C. into the L. & N. "without regard to the provisions of the laws of any state" and by its order had for its purpose to authorize the merger, "state law notwithstanding," except with respect to the size of the stockholder vote required for approval of the merger. The issue presented, however, is not with respect to positive provisions of the law of Tennessee,—it is with respect to the *absence* of any provision under which this type of merger, rather than a consolidation, may be accomplished. These Conclu-

sions of Law do not meet this issue and we are left without any clear indication as to what the District Court actually intended to decide.

QUESTION 11

Did the plaintiff and intervening plaintiff have "standing" to attack the order of the Commission because Mercantile-Safe Deposit & Trust Company of Baltimore was not a party and the Commission did not find that acquisition of control of the Tennessee Company by it would be consistent with the public interest?

The District Court, without applying Section 5(4) of the Interstate Commerce Act as construed in *United States* v. *Marshall Transport Co.*, (1944) 322 U. S. 31, and *Alleghany Corporation* v. *Breswick & Co.*, decided April 22, 1957, held that appellants could not attack the order on the ground in question, (1) because their legal interests were not adversely affected, and (2) because they did not raise the question before the Commission. If they had no standing to raise the question before the Court, because their legal interests were not adversely affected, they had no standing to raise it before the Commission. If the first reason is good, the second is bad, and *vice versa.* Actually the Commission could and should have raised the question *sua sponte,* and since it did not do so, the District Court was authorized to decide it when brought to its attention. Whether technically "jurisdictional" or not is irrelevant.[18]

In *National Labor Relations Board* v. *Highland Park Mfg. Co.*, (1951) 341 U. S. 322, involving review of administrative action, consisting of an order requiring an employer to deal with a union whose officers had not filed an affidavit that they were not members of the Communist Party, the Court said:

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[18] See "Standing to Challenge Governmental Action," 39 Minnesota Law Review 353, 374-381.

"It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency, and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal."

In the instant case the merger of the N. & C. into the L. & N., pursuant to the approval given by the Commission, would be in violation of Section 5(4) because Mercantile-Safe Deposit & Trust Company was not a party and the Commission has not found that its acquisition of control of the Tennessee Company would be "consistent with the public interest." The Trust Company and all other participants would be equally guilty. How can an order be valid if it cannot be lawfully complied with?

These appellants should be permitted to call this matter to the attention of the Court, even though it was not called to the attention of the Commission. We do not assert that the Commission should not be permitted to pass upon the question first. Appellants do not, however, control the protocol which should be observed. The Commission entered a final order which did not provide that interveners could move to reconsider and thereby obtain an automatic stay. The appellants then raised the question in their complaint, as amended. The District Court refused to consider the question at all. We believe this was erroneous.

QUESTION 12

Whether the judgment should be reversed because the order of the Commission did not comply with the thirty-day requirement of Section 15(2) of the Interstate Commerce Act.

The order of the Commission was not released until March 13, 1957, but was effective forty days from the date it bore, March 1, 1957,—in other words, it was effective twenty-seven days from its date of release. It is submitted that the order was void and could not be made valid by subsequently extending its effective date three more days, as the Commission did after the complaint was filed, or by suspending it and later reinstating the original order with a new effective date. The harm which Section 15(2) sought to prevent,—insufficient time for the preparation and filing of proceedings for review,—had already been accomplished.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 2354—Civil

CITY OF NASHVILLE, TENNESSEE, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Decided .....

Before MARTIN, Circuit Judge; DARR and SHELBOURNE, District Judges.

PER CURIAM. The undersigned three-judge court was assembled pursuant to sections 2284 and 2321-2325, Title 18, United States Code, for the hearing of an application for interlocutory injunction. The court has considered the pleadings and the proceedings and evidence adduced before the Interstate Commerce Commission, the entire record in the case, and the oral arguments and briefs of the attorneys for the plaintiff, for the defendants, and for all the interveners, constituting all the parties. It was agreed that the hearing would be a final hearing on the merits upon demand for a permanent injunction.

The court is of opinion that the litigation will be most expeditiously and, at the same time, adequately disposed of finally by the promulgation of findings of fact and conclusions of law, instead of by a lengthy opinion. Accordingly, the following findings of fact and conclusions of law are filed for entry.

FINDINGS OF FACT

1. The Louisville and Nashville Railroad Company, The Nashville, Chattanooga & St. Louis Railway, the Atlantic Coast Line Railroad Company, and The Atlantic Coast

Line Company, hereinafter sometimes referred to collectively as the applicants, and individually as the Kentucky Company, the Tennessee Company, the Coast Line, and the Connecticut Company, respectively, or by the distinctive name in their respective corporate titles, on January 28, 1955, jointly applied for authority under Section 5(2) of the Interstate Commerce Act, as amended, to merge the properties and franchises of the Tennessee Company into the Kentucky Company for ownership, management, and operation. The Connecticut Company and the Coast Line joined in the application because of their control, through stock ownership, of the Kentucky Company.

2. The plaintiff, City of Nashville, and the intervening plaintiffs, State of Tennessee, Tennessee Public Service Commission, Davidson County, Tennessee, and the NC & StL Railway Employees Job Protection Association, intervened before the Interstate Commerce Commission in opposition to the merger. Hearings were held at Washington, D. C., on August 23 to August 26, 1955, and at Nashville, Tennessee, on August 30 to September 1, 1955. Upon petition of the City of Nashville, et al., the Commission, by Division 4, ordered a further hearing at Washington on September 13, 1955, for the purpose of adducing testimony with respect to a routing and solicitation agreement between the Kentucky Company and the Tennessee Company which the Examiner previously had refused to require the applicants to furnish for the record. The Examiner filed a proposed report, recommending the merger on or about June 21, 1956. Exceptions were filed by the plaintiffs and intervening plaintiffs; oral argument before the full Commission was scheduled and held; and, on March 13, 1957, the Commission released a report and order, both dated March 1, 1957, approving the merger. The order was made effective forty days from date, to-wit, on April 9, 1957. The complaint in this case, seeking to set aside and vacate the order of the Commission, was filed March 29, 1957, and a temporary restraining order was issued on April 8, 1957.

3. The application stated that the Connecticut Company has outstanding 235,200 shares of common stock, each share having one vote, and that there were 973 stockholders as of November 13, 1953. The application stated further that, as of November 15, 1954, Mercantile Safe Deposit & Trust Company, 13 South Street, Baltimore 2, Maryland, owned 86,313 shares, and Safe & Company, 13 South Street, Baltimore 2, Maryland, owned 42,636 shares. Safe & Company is a nominee for Mercantile-Safe Deposit & Trust Company. At the hearing before this court, plaintiff filed as an exhibit "Supplemental Application of Mercantile-Safe Deposit & Trust Company and Motion to Dismiss said Supplemental Application" filed July 6, 1956, with the Interstate Commerce Commission in Finance Docket No. 19261, involving application of Atlantic Coast Line Railroad Company and the Atlantic Coast Line Company, under Section 5(2) of the Interstate Commerce Act, for authority to purchase the properties of the Florida East Coast Railway Company. This supplemental application, verified by Thomas B. Butler, President, who is also a director of the Kentucky Company, states that the Mercantile-Safe Deposit & Trust Company, as sole Trustee under various trusts, holds a majority of the voting stock of the Connecticut Company and also holds additional amounts in other fiduciary capacities, and 4,725 shares outright. Mercantile-Safe Deposit & Trust Company did not join in the application in the proceeding here involved.

4. The plaintiff, City of Nashville, brought this suit to annul, vacate and set aside the report and order of March 1, 1957, of the Interstate Commerce Commission in Louisville and Nashville Railroad Company, Et Al., Merger, Etc., authorizing, under Section 5(2) of Title 49, United States Code, the merger of The Nashville, Chattanooga & St. Louis Railway into the Louisville and Nashville Railroad Company and the acquisition of direct control by the Atlantic Coast Line Railroad Company of the surviving

corporation and indirect control of such corporation by The Atlantic Coast Line Company, holding company. The Commission's order was released on March 13, 1957.

The report and order of March 1, 1957 also authorize, under Section 20a of Title 49, United States Code, the issuance by applicant, Louisville and Nashville Railroad Company, of additional shares of stock and the assumption by the Louisville and Nashville Railroad Company of obligation and liability in respect of the securities of The Nashville, Chattanooga & St. Louis Railway.

5. Intervenors, as plaintiffs, are the State of Tennessee, the Tennessee Public Service Commission, the County of Davidson, Tennessee, Robert L. Bryson, Luther Thomas Lambert and Vernon H. Hedgepath, individually and as representative of a class composed of 839 employees of The Nashville, Chattanooga & St. Louis Railway, and the NC&StL Railway Employees Job Protection Association. Interveners, as defendants, are the Louisville and Nashville Railroad Company and The Nashville, Chattanooga & St. Louis Railway. These interventions are authorized by section 2323, Title 28, United States Code.

6. On April 8, 1957, a temporary restraining order was issued by John D. Martin, United States Circuit Judge sitting by designation as District Judge of the United States District Court for the Middle District of Tennessee, Nashville Division, staying the operation of the Commission's order. Such temporary restraining order was issued pursuant to Section 2284 of Title 28, United States Code, to remain in effect until the hearing and determination of the issues by this court.

7. In its report and order, the Commission found that, subject to certain prescribed conditions and to terms and conditions which it found to be just and reasonable, the proposed merger is within the scope of sub-paragraph (a)

of Section 5(2) of Title 49, United States Code, and that it will be consistent with the public interest.

8. The Commission found that the stockholders of both involved companies had voted for the merger. In both companies there was more than a majority of the shares entitled to vote cast for the merger. The only state law which could alter the majority vote requirement of Section 5(11) of Title 49, United States Code, is Section 2610 of Williams' Tennessee Code (Section 65-601 of Tennessee Code Annotated), which requires of Tennessee corporations (The Nashville, Chattanooga & St. Louis Railway being such a corporation) a vote of "three-fourths in amount of the total stock of said company present and voting." This requirement was not in the vote cast for the merger by stockholders of The Nashville, Chattanooga & St. Louis Railway.

9. A comprehensive record was made before the Commission, which held three separate hearings. The transcript of testimony covers 1,733 pages. There were numerous and elaborate exhibits. Extensive briefs, exceptions to the Examiner's proposed report and replies to such exceptions were submitted to the Commission, numerous other documents were filed, and the parties were heard on oral argument by ten members of the Commission, one member not participating. The decision of the Commission was unanimous.

10. The Commission concluded that "the merger would enhance the adequacy of service by the merged companies, and would constitute the best use of the facilities" of the involved companies; that savings approximating $3,243,123 per annum—and probably more—may be expected from the merger; that such "savings and improved efficiency of operation necessarily would strengthen the applicants, and render them capable of better service"; that "Applicants have spent vast sums of money in improvements to their

equipment and plant"; that additional large improvements are in contemplation, but that "Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger"; and that "anticipated accomplishments from the merger would give assurance of a stronger and financially more stable railroad."

11. The Commission found that the Louisville and Nashville Railroad Company owns 74.9% of the capital stock of The Nashville, Chattanooga & St. Louis Railway; that the former company acquired control of the latter company in January, 1880; "that these two railroads have been closely coordinated in service, operation, and managerial relations for more than 75 years, and that the policy of such operation has been harmonious in the interest of both carriers during that long period of time"; and that in such circumstances "it cannot be said that an antagonistic competitive situation has existed between them." The Commission held that there would be a reduction in competition to the extent that competition between the two railroads exists. It found, however, "that the reduction in competition resulting from the merger would be consistent with the public interest."

12. The Interstate Commerce Commission recognized that the economy of the City of Nashville would be adversely affected through loss of employment and loss of a railroad headquarters, and that while shippers will have a certain election of routes, service via such routes will be by the Louisville and Nashville Railroad instead of by the Louisville and Nashville or the Nashville, Chattanooga & St. Louis Railway. The Commission stated, however, that "even approaching this problem from the standpoint that the applicants are truly competitive, it is our view and we find that for the reasons herein set forth the advantages to the public interest from the merger outweigh the disadvantage to the single locality of Nashville."

13. Nashville, a large and important Southern city, Capital of Tennessee, is today served by both the Kentucky and Tennessee Companies and by the Tennessee Central. The Tennessee Central is a small railroad with termini at Hopkinsville, Kentucky, and Harriman, Tennessee. In comparison, Nashville's surrounding neighboring cities have materially more trunk line rail service. Louisville, Birmingham and Memphis are reached by eight trunk lines each; Atlanta, seven; Evansville, five; Chattanooga, four; and Knoxville, two. With the elimination of the Nashville, Chattanooga & St. Louis Railway, Nashville would be served by only one trunk line railroad and would lose the benefit of such competition as now exists between the Louisville and Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway in solicitation and service. Nashville's economy would be adversely affected by the removal of the headquarters of the Tennessee Company and by the elimination or removal of numerous employees of the Tennessee Company who now reside in Nashville and its environs. Many of these employees have been with the company for many years; and, while under the terms of the merger any loss of earnings for four years will be made up, some of them would be required to sell their homes in Nashville and move elsewhere with their families, others would be under the necessity of obtaining other employment with all the disadvantages incident to changing jobs late in life.

The Commission found that a major portion of the savings expected to be accomplished by the merger will be from the displacement of employees.

14. The order of the Interstate Commerce Commission expressly provides that the merger is approved and authorized upon conditions: among others, that it is "subject to the conditions for the protection of railway employees." In its report, the Commission stated its conviction that

any disputes as to particular employees or group of employees affected by the actions of the applicants in consummating the merger may be resolved by following the procedure set forth in Condition # 8, as prescribed in *Oklahoma Railway Co., Trustee Abandonment*, 257 I. C. C. 177 (see especially pages 192, 196, and the discussion entitled "Conclusions" at pages 196 to 202), incorporated in the New Orleans passenger terminal conditions previously prescribed. Such condition provides for consideration and determination by an arbitration committee of questions regarding the eligibility for protection of persons or groups elsewhere described in the conditions.

15: Toward the conclusion of a lengthy colloquy concerning the protection of rights of the Nashville, Chattanooga & St. Louis Railway employees, counsel for the Interstate Commerce Commission, Robert W. Ginnane, Esquire, made the statement that the Commission is without power, in connection with a reorganization, to tell carriers who shall or shall not be laid off as a result of the merger. He stated further that the Commission's power and responsibility are limited to specifying protection of those who are laid off, the choice of those laid off being left to the managerial discretion of the carriers as limited by their collective bargaining agreements. The attorney stated, moreover, that the Commission merely identifies positions which would be affected and does not undertake to state what individuals would be affected.

The attorney for the Louisville and Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company stated that, in the merger agreement between the railroads, it is expressly provided that the Louisville and Nashville will assume any and all obligations and contracts of the Nashville, Chattanooga & St. Louis Railway Company, *including its negotiated union bargaining agreements.*

16. A temporary restraining order was issued in this cause on April 8, 1957, by John D. Martin, United States Circuit Judge, sitting by designation during the present illness of William E. Miller, Judge of the United States District Court for the Middle District of Tennessee; and this cause was set for final hearing before a three-judge court on May 7, 1957. The Chief Judge of the United States Court of Appeals, Sixth Circuit, designated Leslie R. Darr, United States District Judge for the Eastern District of Tennessee, and Roy M. Shelbourne, United States District Judge for the Western District of Kentucky, to sit as two members of the three-judge court, with United States Circuit Judge Martin completing the co[illegible] The designated three-judge court assembled and heard elaborate oral arguments at morning and afternoon sessions on May 7, 1957, following which the case was duly submitted.

CONCLUSIONS OF LAW

1. Section 1336 of Title 28, United States Code, confers on district courts the jurisdiction to enjoin, set aside and annul orders of the Interstate Commerce Commission pursuant to the procedure outlined in Section 2284. The plaintiff and the intervening plaintiffs have standing to maintain this action. *Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258, 267-269; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439.

2. Section 5(2) of the Interstate Commerce Act is constitutional. *United States* v. *Lowden*, 308 U. S. 225. The development and maintenance of an economical and efficient railroad system is a matter of primary national concern and legislation must be read with this purpose in mind. *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118, 124, 125. Compare *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 590.

3. By Section 5(2) of the Interstate Commerce Act, the Interstate Commerce Commission is empowered to author-

ize the merger of two or more railroads without regard to the provisions of the laws of any State, except that State law, if any, may govern the size of the stockholder vote required for approval of a merger.

3. The order of the Commission herein had for its purpose to authorize the merger of The Nashville, Chattanooga & St. Louis Railway into Louisville and Nashville Railroad Company, State law notwithstanding, except to the extent, if any, that State law governs the size of the stockholder vote required for approval of the merger.

5. The findings of the Commission are full and complete and are supported by substantial evidence. They constitute sufficient basis for the order of the Commission herein.

6. An order of the Interstate Commerce Commission is entitled to great respect, representing as it does the opinion of a body of experts upon matters within the range of their special knowledge and experience. *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301, 317; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 488; *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 512, 513; *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547, 548; *Illinois Central R. R.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454.

7. The plaintiff and the intervening plaintiffs object that the Commission committed numerous procedural errors. These objections have been considered by the court and have been found by it to be without merit. None of them is within the rule of prejudicial error, which is the criterion established by Section 10(e) of the Administrative Procedure Act, Title 5, United States Code, section 1009(e). The more important of these alleged errors are set forth below, this court holding in each instance that the action of the Commission did not constitute prejudicial error:

(a) The City of Nashville urged that the Commission should require the applicant railroads to produce certain preliminary reports concerning the merger which were made by a freight traffic manager of the Louisville and Nashville Railroad Company. The Commission stated that, although these reports were not produced by the applicants, "extensive testimony with respect thereto was presented by interveners in opposition through former vice-president in charge of traffic for the Tennessee Company."

(b) The City complains that the Commission refused to require applicants to supply certain employment figures. The record herein shows that the City wanted to use these figures to establish that the Louisville and Nashville Railroad's Accounting Department is overstaffed. Although the requested figures were not produced, the head of the Accounting Department of that railroad was presented as a witness by the railroad and the witness was ready to testify as to whether or not his department is overstaffed.

(c) The City requested that the applicants provide information as to the number of tons delivered by the Louisville and Nashville to the Nashville, Chattanooga & St. Louis Railway at Nashville for each of the years 1951 through 1954. The applicants agreed to supply such figures for 1953 and 1954. The Interstate Commerce Commission did not require that the figures for 1951 and 1952 be produced.

(d) The employee group complains that the Commission erred procedurally in not finding that the adverse effect of the merger on the employees would be "permanent"; in not considering its exception that the merger would produce "poorer" service; and in not considering its contention that diesel locomotive repair costs are higher on the Louisville and Nashville than on the Nashville, Chattanooga & St. Louis. The Commission was not required to make a specific finding on the first point; and the record

shows that it considered the contentions of the employee group on the other two points and rejected them.

8. From this record, we find no showing that there has been any violation of applicable anti-trust laws of the United States. For controlling principles, see *McLean Trucking Co.* v. *United States*, 321 U. S. 67; *United States* v. *Southern Pacific Co.*, 259 U. S. 214.

9. The plaintiff and the intervening plaintiffs complain of the failure of the railroads, in the proceeding before the Commission, to join as an applicant the Mertcantile-Safe Deposit & Trust Company, shown by the application to be the principal stockholder of The Atlantic Coast Line Company. Neither the plaintiff nor any intervening plaintiff has shown wherein such failure adversely affects any of its legal interests. The court held that the failure to join the Mercantile-Safe Deposit & Trust Company was not a jurisdictional defect and does not affect the validity of the Commission's order herein; and that such failure, not being a jurisdictional defect and not having been raised in the proceeding before the Commission, cannot be raised now for the first time before this court.

In *Alleghany Corp.* v. *Breswick & Co.*, U. S. , decided April 22, 1957, it was held that "the failure to join two stockholders alleged to control Alleghany does not oust the Commission of jurisdiction."

In *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37, the Supreme Court said: "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

10. Neither the plaintiff nor any of the intervening plaintiffs has shown any ground upon which the court could

justify an order annulling, vacating or setting aside the order of the Commission.

11. The statute—49 U. S. C., Section 5(2)(f)—provides: "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected."

The approval by this court of the order of the Interstate Commerce Commission of March 1, 1957, approving the merger upon the conditions therein stated, is based upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway Company shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved herein, disclosed in finding of fact Number 15.

12. An appropriate judgment in compliance with the conclusions herein expressed will be drawn and entered.

JOHN D. MARTIN
United States Circuit Judge

LESLIE R. DARR
United States District Judge

ROY M. SHELBOURNE
United States District Judge

Attest: A True Copy
L. B. ORMES, *Clerk*,
U. S. District Court
Middle District of Tennessee
By ROY CARMAN, D. C.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 2354

CITY OF NASHVILLE, TENNESSEE, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Order

This cause came on for a final hearing on the complaint of the City of Nashville and the intervening complaints of the State of Tennessee, the Tennessee Public Service Commission, Davidson County, Tennessee, the NC&StL Railway Employees Job Protection Association, and Robert L. Bryson, Luther Thomas Lambert and Vernon H. Hedgepath, individually and as representative of a class composed of 839 employees of The Nashville, Chattanooga & St. Louis Railway, praying for a decree annulling, vacating and setting aside the report and order of the Interstate Commerce Commission dated March 1, 1957 [in a proceeding before the Commission entitled "Louisville and Nashville Railroad Company et al—Merger, etc., Finance Docket No. 18845"], before a three-judge court duly constituted pursuant to Sections 1336, 2284, and 2321, et seq. of Title 28, United States Code, composed of the Honorable John D. Martin, Judge of the United States Court of Appeals for the Sixth Circuit; the Honorable Leslie R. Darr, United States District Judge for the Eastern District of Tennessee; and the Honorable Roy M. Shelbourne, United States District Judge for the Western District of Kentucky;

And the cause having been heard before such three-judge court on May 7, 1957, and the record in the cause having been duly considered; for the reasons stated in the Findings of Fact and Conclusions of Law filed in this cause on May 24, 1957, and hereby made a part of the record in the cause;

IT IS ORDERED, ADJUDGED AND DECREED, That the complaint of the City of Nashville and the intervening complaints of the State of Tennessee, the Tennessee Public Service Commission, Davidson County, Tennessee, the NC&StL Railway Employees Job Protection Association, and Robert L. Bryson, Luther Thomas Lambert and Vernon H. Hedgepath, individually and as representatives of a class composed of 839 employees of The Nashville, Chattanooga & St. Louis Railway, be, and the same are hereby, dismissed; that the temporary restraining order heretofore granted on April 8, 1957, be, and the same is, hereby terminated and dissolved; and that the defendants and the Louisville and Nashville Railroad Company and The Nashville, Chattanooga & St. Louis Railway are hereby awarded their costs herein;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the approval by this court of the order of the Interstate Commerce Commission of March 1, 1957, approving the merger upon the conditions therein stated, is based upon the express condition that the rights of the employees of The Nashville, Chattanooga & St. Louis Railway shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved herein, disclosed in Finding of Fact No. 15.

JOHN D. MARTIN
United States Circuit Judge

LESLIE R. DARR
ROY M. SHELBOURNE
United States District Judges

Attest: A True Copy
L. B. ORMES, *Clerk*,
U. S. District Court
Middle District of Tennessee
By ROY CARMAN, D. C.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 2354—Civil

CITY OF NASHVILLE, TENNESSEE, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Order—Bond

Pursuant to Rule 62(c), Federal Rules of Civil Procedure, and Rule 36(2) of the United States Supreme Court; and upon consideration of the briefs of counsel which indicate that an appeal is contemplated in the above-styled cause;

It is ORDERED, ADJUDGED AND DECREED, That, in event of appeal, the plaintiffs shall furnish bond in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000).

It is so ordered.

JOHN D. MARTIN
United States Circuit Judge

LESLIE R. DARR
United States District Judge

ROY M. SHERBOURNE
United States District Judge

Attest: A True Copy
L. B. ORMES, *Clerk*,
U. S. District Court,
Middle District of Tennessee
By ROY CARMAN, D. C.

APPENDIX B

Title 5, U. S. Code:

§ 1005. Ancillary matters.

Except as otherwise provided in this chapter—

• • • • • • •

(c) Subpoenas and production of evidence.

Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought . . . June 11, 1946, c. 324, § 6, 60 Stat. 240.

§ 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision.

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

• • • • • • •

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary. June 11, 1946, c. 324, § 7, 60 Stat. 241.

§ 1007. Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record.

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

* * * * * * *

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. June 11, 1946, c. 324, § 8, 60 Stat. 242.

* * * * * * *

§ 1009. Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

. . . . . .

(d) Relief pending review.

Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limi-

tations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243.

Title 15, U. S. Code:

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: . . .

Title 49, U. S. Code:

National Transportation Policy.

Act Sept. 18, 1940, ch. 722, title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12 and 13 of this title, by inserting before part I thereof (chapter 1 of this title) the following provision entitled 'National Transportation Policy:'

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12 and 13 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic

conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act (chapters 1, 8, 12 and 13 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * * * *

§ 5. Combinations and consolidations of carriers—Pooling; division of traffic, service, or earnings.

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this chapter, it shall be unlawful for any common carrier subject to this chapter, chapter 8 of this title, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: Provided, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will

not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: Provided further, That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this title is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

Unification, Mergers, and Acquisitions of Control.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any par thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * *

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Non-Carrier Deemed Carrier Upon Acquiring Control.

(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to

acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this chapter, sections 304 (a) (1) and (2) and 320 of chapter 8 of this title, and section 913 of chapter 12 of this title (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this chapter, and section 314 of chapter 8 of this title (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this chapter and of section 314 of chapter 8 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

Control Effected by Other Than Prescribed Methods.

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amend-

atory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

* * * * * * *

Plenary Nature of Authority Under Section.

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof, called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction, without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the

creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

* * * * * * *

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.—

* * * * * * *

(2) Orders of Commission.

Except as otherwise provided in this chapter, all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.

Tennessee Code:

Section 65-901. Power to consolidate.—Every railroad corporation existing in this state, and having authority to operate and maintain a railroad in this state, shall have power to consolidate with any other railroad corporation whose road shall connect with or intersect the road of such existing corporation, or any branch thereof. [Acts 1871, ch. 69, § 1; 1875, ch. 51, § 1; 1877, ch. 72, § 2; Shan., § 1522; Code 1932, § 2597.]

Section 65-902. Agreement in writing.—The agreement of consolidation shall be in writing, and shall set forth the corporate name agreed upon, and the terms and conditions of the consolidation. [Acts 1871, ch. 69, § 1; 1877, ch. 72, § 2; Shan., § 1523; Code 1932, § 2598.]

Section 65-903. Approval of stockholders.—The consolidation shall not have effect until the terms and conditions of the agreement shall have been approved by a majority of the stockholders of each of the consolidating companies, at a regular annual meeting. [Acts 1867-1868, ch. 72, § 1; 1871, ch. 69, § 1; 1877, ch. 72, § 2; Shan., § 1524; mod. Code 1932, § 2599.]

Section 65-904. Agreement—Evidence of stockholders' approval—Recorded in secretary of state's office.—The agreement, together with the evidence of the stockholders' approval, shall be filed and recorded in the office of the secretary of state. [Acts 1871, ch. 69, § 1; 1877, ch. 72, § 2; Shan., § 1525; Code 1932, § 2600.]

Section 65-905. Rights of creditors.—The rights of creditors of the consolidating companies shall in no wise be affected or impaired by such consolidation. [Acts 1871, ch. 69, § 1; 1877, ch. 12, § 4; 1877, ch. 72, § 2; Shan., § 1526; Code 1932, § 2601.]

Section 65-906. Consolidation of two or more corporations—Rights and liabilities of new corporation.—The corporation, formed by the consolidation of two (2) or more railroad corporations, shall have, possess, and exercise all the rights, powers, privileges, immunities, and franchises, and be subject to all the duties and obligations, not inconsisteht with the provisions of this chapter, conferred and imposed by the laws of this state upon such companies so consolidating, or either of them. [Acts 1877, ch. 72, § 3; Shan., § 1527; Code 1932, § 2602.]

Section 65-907. Powers of consolidated company.—It shall have power:

(1) To fix the number of its directors and the time of their election.

(2) To fix the number, names, and duties of its officers.

(3) To pass by-laws for the government of the company, and the management of its affairs.

(4) To create and divide its capital stock into two (2) or more classes, including common and preferred stock, any of which may be stock without par value and to issue the same, all as provided by §§ 48-202—48-204, pertaining to ordinary domestic corporations, which sections are declared to extend to corporations formed by the consolidation of two (2) or more railroad corporations; and any such corporation, heretofore so formed under the laws of this state, may avail itself of the powers and privileges hereby conferred by amendment or amendments to the charter of incorporation of such corporation, in the manner and by the means as now provided by law, or to the agreement of consolidation, setting forth the maximum number of shares of stock with nominal or par value and the maximum number of shares without nominal or par value that the corporation is authorized to have outstanding at any time, the classes, with the distinguishing characteristics of each, if any, into which the same are divided, and the nominal or par value of shares of stock other than shares which it is stated are to have no nominal or par value.

(5) To issue bonds and dispose of same in such form, and denomination, and bearing such interest, as the board of directors may determine, and to secure the payment thereof by mortgage of every and all the property and franchises of said consolidated company, and of the companies from which it was formed.

(6) And to do all other acts and things which the said companies so consolidating, or either of them, might have done previous to such consolidation. [Acts 1877, ch. 72, § 3; Shan., § 1528; Code 1932, § 2603; Acts 1937, ch. 170, § 1; C. Supp. 1950, § 2603.]

Section 65-908. Privileges and exemption from taxation not transferred.—No franchise, right, power, immunity, or exemption not granted at the time of consolidation by the laws of this state to the railway companies which may form part of such consolidated company shall be given to, transferred to, or conferred upon any such consolidated company, or company or person operating such consolidation of railroads as provided for in this chapter or in any other law of this state; and no exemption from taxation of railroad property and franchises, and capital stock therein, contained in railway charters or other railway laws of this state, shall be transferred to, or conferred upon such consolidated company or the property and franchises and capital stock therein of such consolidation of railroads, or of the property appertaining thereto and used in the operation thereof. [Acts 1877, ch. 72, § 3; Shan., § 1529; Code 1932, § 2604.]

APPENDIX C

85TH CONGRESS, 1ST SESSION

H. R. 2142

IN THE HOUSE OF REPRESENTATIVES

JANUARY 7, 1957

MR. CELLER introduced the following bill; which as referred to the Committee on the Judiciary

A BILL

To amend the Sherman Act to declare the primacy of free enterprise, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of July 2, 1890 (ch. 647, 26 Stat. 209) Fifty-first Congress, first session (15 U. S. C., sec. 1 and the following), as amended, is further amended by inserting immediately before section 1 thereof the following:

"DECLARATION OF POLICY

"It is the policy of the United States that to the maximum extent practicable the principles of free private enterprise embodied in the antitrust laws shall be maintained. All officials, agencies, boards, and commissions authorized by Congress to regulate business and industry shall discharge their statutory responsibilities in a manner to give the maximum effect to this policy.

"No official, agency, board, or commission authorized under any provision of law to approve arrangements involving exemption from the antitrust laws shall grant approval of such exemption unless the official, agency, board, or commission finds that it is impracticable to discharge statutory responsibilities in a manner consistent with the antitrust laws.

"Where Congress has authorized any official, agency, board, or commission to restrict entry into an industry such authority shall be exercised in a manner to give the maximum effect practicable to the objectives of the antitrust laws.

"Unless any provision of law expressly provides otherwise, no proceeding instituted by the United States in the courts of the United States charging violation of the antitrust laws shall be barred or stayed for the reason that any official, agency, board, or commission has jurisdiction or is exercising jurisdiction over some or all of the activities included in the alleged antitrust violation."

Excerpts From Representative Celler's Press Release of January 7, 1957

* * * * * * *

II. The second bill, the Primacy of Free Enterprise Bill, amends the Sherman Act by having Congress declare that it is the policy of the United States to maintain to the maximum extent practicable the American system of free competitive enterprise embodied in the antitrust laws. Its purpose is to establish a guide for administrative agencies, regulatory bodies and the courts in the exercise of their powers over business and arrangements involving exemptions from the antitrust laws. It creates a presumption in favor of free enterprise which will assure that our antitrust policy favoring competition is not subordinated unless this is found necessary to attain other objectives established by Congress. The bill makes it clear that Congress, in authorizing administrative bodies to regulate business and industry, intended such regulation to supplement and not to supersede our system of free competitive enterprise.

Rulings by administrative bodies and judicial decisions have unduly expended authorized exemptions from the

antitrust laws. Regulatory bodies and the courts have vacillated in the weight required to be afforded to antitrust objectives in determining the public interest. This bill establishes a guide so that there will be greater consistency in administrative and judicial action in this area. This bill is a recognition that it is time for Congress to reassert positively its belief that while it recognizes that competition alone will not always protect the public interest adequately, departures from antitrust norms should be kept to a minimum and that competition shall be preserved and encouraged in the regulated industries except where it appears that over-riding statutory objectives cannot be achieved under competitive conditions.

Under the doctrine of primary jurisdiction, the courts of the United States have declined to give relief against allegedly unlawful restraints of trade if it appeared that administrative agencies have been vested with authority to approve some or all of the activities challenged as illegal. The courts have withheld their powers in these cases out of deference to superior technical experience, commonly referred to as "expertise" of the regulatory agencies. One result of the application of this doctrine of primary jurisdiction, however, has been that the Attorney General has been ousted from his prescribed duty to enforce the antitrust laws and, in regulated industries, business firms involved in activities illegal under the antitrust laws have been granted a greater immunity than intended by Congress.

As this doctrine of primary jurisdiction has been construed by the courts, the Attorney General appearing for the United States in its sovereign capacity to prevent and restrain violations of its criminal laws has been relegated to the position of a supplicant before regulatory bodies. Moreover, under existing judicial decisions, the Attorney General must go to the administrative agency even if that body has never approved the activities being attacked by

the United States and no exemption from the antitrust laws has been obtained.

This bill would make it clear to the courts that it is the intention of Congress that suits brought by the United States to prevent or to punish activities declared to be illegal by the antitrust laws should not be stayed or barred on the ground that any other agency of the Government also has jurisdiction over the activities challenged by the Attorney General.

Office - Supreme Court, U.S.
FILED
OCT 29 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 365

CITY OF NASHVILLE, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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RICH PRINTING COMPANY, NASHVILLE

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APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

Pursuant to Rule 16, paragraph 3, of the Rules of this Court, appellants oppose the motions to affirm filed herein, for the reasons stated below.

STATEMENT

In order to reply as concisely as possible to the briefs of appellees in support of their motions to affirm, we shall ignore contentions which were anticipated in the Jurisdictional Statement and reply only to new contentions made by appellees, to whom we shall refer as the L. & N. and the I.C.C. Since the L. & N. brief is in much greater detail than the I.C.C. brief, we shall make primary reference to the former in this reply, and then refer to any additional contentions made by the I.C.C.

The Report of the Commission has been officially reported, 295 I.C.C. 457.

ARGUMENT

Opening Statement
(Pages 2-4)

The L. & N. states that the merger became effective August 30, 1957, so that the N. & C. does not join in the motion to affirm. The L. & N. omits to state that, while the "Agreement of Merger" was tendered to the Secretary of State of Tennessee for filing, he declined to file it on advice of the Attorney General of Tennessee, and that the L. & N. has brought no proceeding similar to that in *Seaboard Air Line Railroad Co.* v. *Daniel*, (1948) 333 U. S. 118, to determine the questions of law involved. These questions are discussed in our Jurisdictional Statement under Question 10.

Question 1
(Pages 6-21)

The burden of the L. & N. argument, as well as that of the I.C.C., is that Section 5(2) of the Interstate Commerce Act, when read in the context of the "National Transportation Policy" (Transportation Act of 1940), and of its applicability to carriers by highway and water as well as by rail, must be interpreted in exactly the same way as old Section 5(4), when read in the context of the compulsory consolidation provisions of the Transportation Act of 1920, and of its applicability to rail carriers alone. The contention is that consolidation of railroads is still an "established national policy," citing *United States* v. *Lowden*, (1939) 308 U. S. 225, 232. It is contended that the only change made in the law is that voluntary mergers and consolidations have been substituted for compulsory consolidations, citing *Schwabacher* v. *United States*, (1948) 334 U. S. 182.

Congressional purpose may be manifested by context as well as by text. (*Addison* v. *Holly Hill Co.*, (1944) 322 U. S. 607, 615). The opinion in *McLean Trucking Co.* v. *United States*, (1944) 321 U. S. 67, makes clear that the congressional policy is no longer that of the Transportation Act of 1920.

Footnote 26 to the opinion in the *McLean Trucking* case (321 U. S. 86) quotes a statement made by Senator Wheeler in the Congressional discussion of the Motor Carrier Act of 1935, as follows:

> "At present most truck operations are small enterprises. However, there are many rumors of plans for the merging of existing operations into sizable systems. In view of past experience with railroad and public-utility unifications, it is regarded as necessary that the Commission have control over such developments, where the number of vehicles involved is sufficient to make the matter one of more than local importance."

The "control" of mergers and consolidations of railroads and water carriers as well as of truck lines was intended by Congress to be exercised in the "public interest," and one important facet of the public interest is the "preservation of independent and competing" units where that is feasible. (321 U. S. 87). If there is language in the *Schwabacher* opinion which could be construed as meaning that approval of railroad mergers and consolidations by the Commission should be merely a matter of form, to carry out a policy of encouraging transportation monopolies as being inherently desirable, it was unnecessary to the decision in that case.

Although the Commission itself made no such suggestion, the L. & N. undertakes to support the Commission's action on the theory that the N. & C. was a "weak" railroad which should be absorbed by a strong one in the public interest, and in support of the argument points to the "sharp decline in the operating results of the N. C. & St. L. in 1955 and 1956." (p. 11). The L. & N. omits to point out that this decline came about after the merger announcement and after the L. & N. had replaced independent N. & C. directors with L. & N. employees. (See L. & N. Answer, par. 12.3). The decline in earnings simply establishes the contentions made by the interveners in opposition to the merger, including the prediction that a large volume of traffic would be lost to other railroads. The mere announcement of the merger was, of course, sufficient to start such a ball rolling.

At pages 16-17, the L. & N. argues that the railroad industry is handicapped by "governmentally-subsidized competition" from airway, waterway, and highway transportation and by tax and regulatory laws which "discriminate against the railroads." The Commission had noted the new highway program which will aid the motor carrier industry, improvement of inland waterways at public expense, and the increasing Congressional appropriations for airport construction (295 I.C.C. 475-476) and had concluded that the merger will enable the L. & N. "to meet more effectively competition from other modes of transportation" (295 I.C.C. 504). But the "National Transportation Policy,"* by which the Commission is to be governed, calls for fair and impartial regulation of all modes of trans-

* 34 Stat. 899 (1940); 49 U. S. C., preceding Section 1.

portation, and the *McLean Trucking* decision emphasizes that Congress did not intend "to create one authority for rail consolidations and another for motor carriers," but that "identical provisions govern both." (321 U. S. 78-79).

The assumption underlying the Commission's approval of this merger is that Congress itself has discriminated against railroads by subsidizing other modes of transportation and that the Commission should counteract these Congressional inequities by exercising its regulatory powers so as to foster and promote railroad monopoly and thereby enable railroads to meet subsidized competition. Obviously, this basis for approval by the Commission of mergers of carriers is available only to railroads. The approval of railroad mergers on this theory violates the Congressional mandate that the Commission is to regulate the different modes of transportation impartially and by application of the same standards.

In the I.C.C. brief (page 8), it is said: "The appellants' real contention, that preservation of competition is the controlling legislative policy in Section 5, was rejected by this Court in *McLean Trucking Co.* v. *United States, supra.*" On the assumption that such is appellants' *real contention*, the I.C.C. argues that Question 1 is unsubstantial. But the I.C.C. has misstated appellants' real contention. We have not contended that preservation of competition is the *controlling* legislative policy in Section 5. We do contend that the Commission substituted a policy of its own for the policy of Congress.

Question 2

(Pages 21-34)

The appellees undertake in their briefs to support the order of the Commission and the decision of the District Court by the argument that, where one railroad has suppressed the greater part of another railroad's competition, by use of stock control, so that the elimination of the remaining competition between them is relatively insignificant, the Commission has no power to consider whether the existing suppression of competition has taken place in violation of the Sherman Act. The far-reaching consequences of such a contention, if sustained, are readily apparent; and we respectfully urge that if this were the only question at issue, the appeal would merit the fullest consideration by this Court.

Conspicuously absent from the appellees' briefs is any effort to deny that the existing suppression by the L. & N. of the competition of the N. & C. was and is in violation of the Sherman Act. The authorities cited in the Jurisdictional Statement to this effect are not mentioned and there is a complete avoidance of the subject.

The I.C.C. in its brief (page 11), says: "We are aware of no case in which the Commission has withheld approval of an application under Section 5 because of the asserted illegality of relationships entered into prior to the enactment of Section 5 in 1920." This is equivalent to saying that an asserted violation of Section 5 should be considered by the Commission, but an asserted violation of the Sherman Act should not be considered. No authority is cited in support of this

view. In *New York Central Securities Co.* v. *United States*, (1932) 287 U. S. 12, to which reference is made, there was no contention that the New York Central was suppressing the competition of the Big Four and Michigan Central in violation of the Sherman Act. The question before the Commission was that of "the public interest in having the control maintained." (287 U. S. 23). In the instant case the Commission did not consider "the public interest in having the control maintained," but only whether, on the implied assumption that the existing suppression of competition is consistent with the public interest, the further step of a merger is also consistent therewith.

Question 9

(Pages 35-49)

While quoting at some length from the transcript of the oral argument before the three-judge court, the L. & N. has omitted to quote two pertinent statements made by members of the Court which indicate what the Court was really attempting to do in incorporating the "express condition" with respect to seniority rights of employees in the final judgment. We quote as follows:

> "JUDGE DARR: (interrupting) When there is a merger, why, it doesn't matter about the size of the company. The employees should be taken care of according to seniority regardless of which road they were formerly employees." (Tr. 181).
>
> * * * * *
>
> "JUDGE MARTIN: Now, frankly, Brother Grubbs, here is what all three of us are concerned

with, and that is a [the] substantial justice of the case, and that is that the employees who are bumped off as a result of this merger should not be exclusively the employees of the NC&St.L." (Tr. 184).

To avoid duplication, we refer the Court, for further elaboration of Question 3, to the Jurisdictional Statement filed by the appellants, NC&StL Railway Employees Job Protection Association, et al., in No. 519. If the interpretation placed by the appellees on the "express condition" in the judgment is correct, the language in question is without any force or effect whatever, and its incorporation in the judgment was meaningless.

Question 4

(Pages 50-59)

Here the L. & N. contends that questions are raised which were not raised below. The questions presented were disposed of by the District Court in its Conclusion of Law No. 7. The request for a *subpoena duces tecum* was merely the preliminary means by which the interveners in opposition to the merger sought to obtain the evidence referred to. Having failed to obtain it this way, the interveners sought to obtain it on cross-examination.

The first sentence in Paragraph 7 of the Complaint reads as follows:

"7. The hearings were conducted on the erroneous procedural theory that since the burden of proof was on the applicants and it was

> 'their responsibility to decide, at their own risk, the nature and kind of evidence to be presented in support of the application,'

and since they complied with the Commission's order of October 14, 1950, and

> 'submitted ample evidence sufficient and adequate to sustain the material allegations contained in the application,' (Sheet 71, under caption 'Discussion and conclusions'),

the applicants were free to refuse to produce documents and figures called for on cross-examination for the purpose of testing the credibility, weight and value of the evidence actually offered, and that it was then proper for the Commission to make its findings of fact on the basis of the evidence actually offered, without considering the effect which the documents and figures called for on cross-examination might have had if they had been produced . . . . "

The action of the Examiner in sustaining applicants' objections was a "restriction on cross-examination." Clearly the questions presented were properly raised below, even though the exact phrase "restriction on cross-examination" was not used in the Complaint.

Question 5

(Pages 60-64)

The L. & N. vigorously denies that the Administrative Procedure Act as construed in *Universal Camera Corp.* v. *National Labor Relations Board*, (1951) 340 U. S. 474, "enlarged the scope of judicial review" with

respect to "such questions as are presented in a railroad merger case." (p. 61). In support of this contention, the L. & N. cites and quotes (p. 62) from the *McLean Trucking* case, 321 U. S. at pp. 87-88. But the *McLean Trucking* case was decided before the enactment of the Administrative Procedure Act.

The slant of the District Court toward its responsibilities with respect to the review of the Commission's order was foreshadowed in the following colloquy during the oral argument:

> "JUDGE MARTIN: . . . In the first instance, I would think that the Interstate Commerce Commission has to construe the act of Congress to see how to carry out the policy because it is a policy commission. It is given very broad expertise as Brother Frankfurter, I think, used the word a lot. As an expertise board or commission, it is given quite broad scope of power as you well know.
>
> MR. WALLER: I am talking about review.
>
> JUDGE MARTIN: In interpretation as well as in fact-finding for the public interest.
>
> MR. WALLER: I think there is squarely presented to Your Honors the question as to whether or not this Court can defer to any interpretation of the law by the Commission. I say not.
>
> JUDGE MARTIN: Well, of course, if an issue is put up to us clearly, as you are arguing here, that the Interstate Commerce Commission has misconstrued the policy of Congress, you are on sound ground and we will review; but what I

meant was that I thought you were stating the proposition a little too broadly in hurdling completely the policy power of the Interstate Commerce Commission in the first instance. It does have policy powers, I believe.

MR. WALLER: I don't think Congress delegated policy powers to the Interstate Commerce Commission.

JUDGE MARTIN: Well, they have exercised it, it seems to me, time and again throughout the years without challenge." (Tr. pp. 40-41).

In *Opp Cotton Mills* v. *Administrator*, (1941) 312 U. S. 126, at p. 145, this Court said:

> " . . . The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. . . . "

In *Addison* v. *Holly Hill Co.*, (1944) 322 U. S. 607, at p. 616, this Court said:

> " . . . The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."

There is nothing in Conclusion of Law No. 6 to suggest that the District Court regarded the Commission's powers as being limited by these concepts. Apparently the District Court's views coincided completely with the views advanced by the L. & N. in its brief, both with respect to the powers of the Commission and the proper scope of judicial review. We think that these

views are erroneous, and that on such questions as the relative importance of preserving competition and the proper interpretation of the national transportation policy there is no administrative "expertise" which should induce judges to defer to commissioners.*

Finally, the L. & N. calls attention to the statement in the preliminary paragraph of the District Court's decision that the Court "has considered," among other things, "the entire record in the case." The problem is one not of semantics but of substance, and we question whether the Court intended to convey the impression that they, or any of them, had actually "reviewed the whole record, or such portions thereof as may be cited by any party," in making the determination that the findings of the Commission were supported by substantial evidence. The normal place for such a statement would have been in Conclusion of Law No. 5.

Questions 6 and 7

(Pages 64-67)

Again the L. & N. relies upon decisions antedating the Administrative Procedure Act, including the statement of Mr. Justice Cardozo in *Mississippi Valley Barge Line Co. v. United States*, (1934) 292 U. S. 282, 286-287, as to the exhaustion of the judicial function "when there is found to be a rational basis for the conclusions approved by the administrative body." But Mr. Justice Cardozo was speaking of "the structure of a rate schedule," —a technical and specialized subject.

* See Schwartz, "Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility," 67 Harvard Law Review 436 (1954).

Question 8

(Pages 67-77)

Here the L. & N. relies upon *Baltimore Transfer Co.* v. *Interstate Commerce Commission*, (1935) 114 F. Supp. 558 (affd. 346 U. S. 890), which indeed is cited three times in the brief. The District Court in that case was of the opinion that the question whether the Commission's orders were "supported by adequate findings and substantial evidence" involved "the application of the rule of administrative finality, which is that if the Commission's order is based upon adequate findings which, in turn, are supported by substantial evidence, it cannot be disturbed by a court on review, even though the court might consider the Commission's action wrong, and against the weight of the evidence.", citing the *McLean Trucking* case, among others. The Court then said (p. 564):

> "The Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., has not altered the rule of administrative finality. *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456."

This conception of the "rule of administrative finality" differs from the usual conception of that rule. Cf. *Levers* v. *Anderson*, (1945) 326 U. S. 219. We submit that the *Baltimore Transfer* case is not a sound authority on the meaning and effect of the Administrative Procedure Act.

Question 9

(Pages 77-78)

The L. & N. relies upon the statement in the *McLean Trucking* case (321 U. S., pp. 87-88) that:

> " . . . 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' . . ."

Again we point out that this decision was rendered before the enactment of the Administrative Procedure Act. That Act requires the exercise by the courts of their own wisdom and experience, in reviewing administrative action, to determine whether the policy of Congress has actually been carried out, or whether the agency has allowed its determination to be influenced by prejudices and policy conceptions of its own with respect to what is consistent with the public interest. In the instant case the Commission made it abundantly clear that its conception of policy was to foster and promote railroad mergers and consolidations in order to counteract a supposed Congressional policy of "subsidizing" other forms of transportation, even where the involved railroads are competitive or potentially competitive, and neither of them is a "weak" railroad.

Question 10

(Pages 78-82)

The L. & N. states that the questions here presented were not presented below and cannot properly be considered by this Court. It is sufficient in answer to this contention to quote Paragraph 17 of the Complaint, which is as follows:

"17. Plaintiff further alleges that if the order of the Commission dated March 1, 1957, be construed as an order granting the applicants authority, without authorization by Tennessee law, to merge the Tennessee Company into the Kentucky Company, said order is to that extent void and of no effect. Plaintiff alleges that actually said order of the Commission is merely permissive and does not undertake to confer authority not given by state law. However, if plaintiff should be incorrect in this construction of the order, plaintiff would show to the Court that the charter of the Tennessee Company (Acts, Tennessee, 1845-6, Ch. 1 and amendments thereto) is a contract between the Tennessee Company and the State of Tennessee; that it contains no provision authorizing the Tennessee Company to extinguish or abandon its corporate existence and franchises by merger into a corporation of another state; that there is no general law in Tennessee which authorizes a railroad corporation incorporated by special act to extinguish or abandon its corporate existence and franchises in this manner; and that while any state law in conflict with a valid federal law is invalid, Congress has not, in Section 5 of the Interstate Commerce Act, as amended (Title 49, U. S. Code), or otherwise, conferred or attempted to confer on the Commission the power and authority to supply deficiencies in state corporation laws. If, however, Section 5 of the Interstate Commerce Act be construed as attempting to confer upon the Commission the power and authority to supply such statutory authority, where not supplied by state law, then Section 5 of the

> Interstate Commerce Act, as so construed, violates the Tenth Amendment to the Federal Constitution and is unconstitutional and void (Hopkins Savings Ass'n. v. Cleary, 296 U. S. 315)."

It is submitted that these allegations satisfy all requirements with respect to particularity in pleading, and that the question presented on the appeal is identical with that presented in the Complaint, although couched in different language.

The appellees undertake to distinguish *Hopkins Savings Association* v. *Cleary*, (1935) 296 U. S. 315, by asserting that the authority of the Commission over rail mergers is "exclusive and plenary." This language of Section 5(11) must be read, however, in connection with the last sentence, which says: "Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State." This language means that Congress did not pre-empt the field now occupied by state corporation laws. The Tennessee corporation laws, providing for consolidations but not mergers of railroad companies, do not constitute a burden upon interstate commerce, and do not constitute "restraints, limitations and prohibitions of law" from the "operation" of which the railroads are "relieved" by Section 5(11) of the Interstate Commerce Act. *Seaboard R. Co.* v. *Daniel*, (1948) 333 U. S. 126, cited by the I.C.C. (p. 17), is distinguishable for this reason.

The L. & N. further contends that Section 65-601, Tennessee Code, authorizes this merger. This statute simply authorizes railroads to "acquire by purchase, lease or otherwise" other railroads. Obviously this language cannot be construed as an authorization of corporate mergers. The Attorney General of Tennessee does not think so and the L. & N. has sought no declaration from the Tennessee courts pursuant to which the Secretary of State would be authorized to file the "Agreement of Merger" on the basis of this or any other Tennessee statute.

Question 11

(Pages 82-86)

Since the contentions of appellees were anticipated in the Jurisdictional Statement, no further comment will be made.

Question 12

(Pages 87-89)

The L. & N. asserts (p. 89) that "it has been held that the thirty-day requirement of Section 15(2) applies only to orders entered under Section 15(1) of the Interstate Commerce Act," citing footnote 3 of the opinion in *United States* v. *American Ry. Express*, (1924) 265 U. S. 425, 430, where the provisions of Section 15(1) are related, followed by the sentence: "Paragraph 2, of § 15, deals only with the time when the orders under par. 1 take effect." The L. & N. would have the Court believe that the word "only" was intended to modify "orders under par. 1." We submit that the word "only" was intended to modify the entire clause, with emphasis on "the time." The L. & N.

omits to call the Court's attention to *U. S.* v. *Baltimore & Ohio R. Co.*, (1931) 284 U. S. 195, where an order under par. 6 of Section 15 was held void because of failure to comply with the thirty-day requirement.

We wish to emphasize that the opponents of the merger had only twenty-seven days within which to study the report of the Commission, prepare their Complaint, and arrange with the District Court for a hearing on a motion for a temporary restraining order after giving proper notice to the interested parties. Extensions *after* the Complaint was filed were of no help whatever, and did not have the effect of curing the invalidity of the order. Cf *U. S.* v. *Baltimore & Ohio R. Co.*, *supra*. Moreover, if the order was void, it is immaterial whether appellants were "prejudiced," and the argument of the I.C.C. (p. 20) that they were not prejudiced is beside the point.

Conclusion

(Pages 89-91)

The L. & N. quotes from the order of April 9, 1957, designating the three-judge court, which does not show on its face which judges were the "two other judges" designated by the Chief Judge of the Circuit. If an inference could be drawn from this order that District Judge Darr or District Judge Shelbourne sat as District Judge, and that Circuit Judge Martin was designated as one of the "two other judges," such inference is rebutted by Finding of Fact No. 16, reading as follows:

"16. A temporary restraining order was issued in this cause on April 8, 1957, by John D. Martin, United States Circuit Judge, sitting by designation during the present illness of William E. Miller, Judge of the United States District Court for the Middle District of Tennessee; and this cause was set for final hearing before a three-judge court on May 7, 1957. The Chief Judge of the United States Court of Appeals, Sixth Circuit, designated Leslie R. Darr, United States District Judge for the Eastern District of Tennessee, and Roy M. Shelbourne, United States District Judge for the Western District of Kentucky, to sit as two members of the three-judge court, with United States Circuit Judge Martin completing the court. The designated three-judge court assembled and heard elaborate oral arguments at morning and afternoon sessions on May 7, 1957, following which the case was duly submitted."

Judge Martin had been designated to sit as a District Judge in the Middle District of Tennessee during the months of April and May, 1957, by order entered in the United States Court of Appeals for the Sixth Circuit on April 2, 1957, and in the United States District Court for the Middle District of Tennessee on April 4, 1957, which, omitting the caption, is as follows:

"Owing to a temporary illness of United States District Judge William E. Miller, of the Middle District of Tennessee, I hereby designate the Honorable John D. Martin, United States Circuit Judge, to sit as a District Judge in the Middle

District of Tennessee during the months of April and May of 1957, and to exercise all of the powers and duties of such Judge for the period designated and for such further period as it may become necessary to complete unfinished business.

"Executed at Cincinnati, Ohio, this 2d day of April, 1957.

CHARLES C. SIMONS,
Chief Judge,
United States Court of
Appeals for the Sixth
Circuit"

The question is whether the designation of two District Judges to sit with Judge Martin was a compliance with 28 U. S. C., Section 2284 (1) requiring the Chief Judge of the Circuit to designate "two other judges, at least one of whom shall be a circuit judge," to constitute the three-judge court in cases of this character.

CONCLUSION.

It is respectfully submitted that this appeal presents substantial questions warranting further argument before and full consideration by this Court. Therefore, it is requested that the motions to affirm filed herein by appellees be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957.

CITY OF NASHVILLE, TENNESSEE, et al., - - - - - Appellants,

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al., - - Appellees.

No. 365.

MOTION OF APPELLEE LOUISVILLE AND NASHVILLE RAILROAD COMPANY TO AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

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IN THE

Supreme Court of the United States

October Term, 1957.

CITY OF NASHVILLE, TENNESSEE, ET AL., - - - *Appellants,*		
v.		No. 365.
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., - *Appellees.*		

MOTION OF APPELLEE LOUISVILLE AND NASHVILLE RAILROAD COMPANY TO AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

I.

THE MOTION.

Louisville and Nashville Railroad Company, appellee in the above-entitled case,[1] moves that the judgment below be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

In support of this motion this appellee respectfully presents the following:

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[1]Intervening defendant below, as of right, under 62 Stat. 970 (1948), as amended, 63 Stat. 105 (1949); 28 U. S. C. §2323. Appellee received appellants' Jurisdictional Statement on August 10, 1957.

II.

BRIEF IN SUPPORT OF THE MOTION.

Opening Statement.

This action involves an attack on an order of the Interstate Commerce Commission[2] authorizing the merger of The Nashville, Chattanooga and St. Louis Railway (herein called N.C.& St.L.) into the Louisville and Nashville Railroad Company (herein called L.& N.), under Section 5(2) of the Interstate Commerce Act.[3] The three-judge court below made the following finding of fact:

> "9. A comprehensive record was made before the Commission, which held three separate hearings. The transcript of testimony covers 1,733 pages. There were numerous and elaborate exhibits. Extensive briefs, exceptions to the Examiner's proposed report and replies to such exceptions were submitted to the Commission, numerous other documents were filed, and the parties were heard on oral argument by ten members of the Commission, one member not participating. The decision of the Commission was unanimous." (pp. 5-6, typewritten copy of decision; p. 5a, Appendix A, Appellants' Jurisdictional Statement)

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[2]Dated March 1, 1957, but which, after postponements required by the proceeding below, did not become effective until August 14, 1957, under a subsequent order of the Commission dated July 10.

[3]24 Stat. 380 (1887), as amended, 54 Stat. 905 (1940), 63 Stat. 485 (1949); 49 U.S.C. §5(2).

The court below stated:

". . . The court has considered the pleadings and the proceedings and evidence adduced before the Interstate Commerce Commission, the entire record in the case, and the oral arguments and briefs of the attorneys for the plaintiff, for the defendants, and for all the interveners, constituting all the parties. It was agreed that the hearing would be a final hearing on the merits upon demand for a permanent injunction." (p. 1, typewritten copy of decision; p. 1a, Appendix A, Appellants' Jurisdictional Statement)

Included in its Findings of Fact[4] is the following:

". . . The designated three-judge court assembled and heard elaborate oral arguments at morning and afternoon sessions on May 7, 1957, following which the case was duly submitted." (p. 9, typewritten copy of decision; p. 9a, Appendix A, Appellants' Jurisdictional Statement)

By its decision of May 24, 1957, the court upheld the order of the Commission.

We believe it appropriate and desirable to supplement, in order to bring down to date, the statement of steps taken in this proceeding as recited at page 6 of appellants' Jurisdictional Statement.

On August 10, 1957, appellants, and also the N.C.& St.L. Railway Employees Job Protection Association, served on appellee motions for a stay directed to Mr. Justice Brennan, and appellee opposed said motions

[4]Finding of Fact No. 16.

by a reply dated August 12, 1957. Mr. Justice Brennan denied the motions on August 15, 1957.

We believe it should also be explained that following this, or on August 30, 1957, the merger of the N.C.& St.L. into the L.& N. became effective, hence this motion to affirm is made in behalf only of appellee Louisville and Nashville Railroad Company rather than that Company and The Nashville, Chattanooga and St. Louis Railway, intervening defendants below.

Appellants as plaintiffs below raised a great variety of questions which, if not frivolous, were at most of a scatter-shot variety. After considering them all, the court below in its Conclusion of Law No. 10 held:[5]

> "Neither the plaintiff nor any of the intervening plaintiffs has shown any ground upon which the court could justify an order annulling, vacating, or setting aside the order of the Commission." (p. 13, typewritten copy of decision; pp. 12a-13a, Appendix A, Appellants' Jurisdictional Statement).

We shall take up one by one the questions presented on appeal and show (1) that each one of them is unsubstantial, and (2) that some of them are not even timely or properly raised, as hereinafter specified.

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[5]The decision of the court below was unanimous.

Summary of Argument.

Although many questions, bearing twelve numbers but being more than twelve in fact, since some of the questions numbered embrace more than a single question, are presented by appellants, none of them is substantial.

The Interstate Commerce Commission has correctly interpreted and applied Sections 5(2) and (11) of the Interstate Commerce Act as those statutes relate to railroad mergers.

It is not for the Commission, but for the courts, to determine whether in a given situation there has been a violation of the Sherman Act. Aside from that, permissibility of railroad mergers under the Interstate Commerce Act is not to be measured by the standards of the antitrust laws.

The various procedural questions raised by appellants disclose no prejudicial error in the decision of the Commission.

The three-judge court below correctly decided the issues and was entirely right in concluding that the considerations involved in a determination of whether a proposed merger of two railroads would be "consistent with the public interest" were matters within the special competence of the Commission.

The Commission made the necessary findings to support its ultimate conclusion that the merger proposed would be consistent with the public interest, which findings are supported by the evidence.

The Commission's report meets the standards of the Administrative Procedure Act.

The question whether the Mercantile-Safe Deposit & Trust Company was a necessary party to the application before the Commission is not jurisdictional, comes too late, having been raised for the first time before the District Court, and appellants have no legal interest in the question.

The Commission gave the requisite public notice in the issuance of its orders.

Some of the questions raised here may not properly be considered because they were not raised below.

Question 1 Presents No Substantial Question.

Appellants' Question 1 is whether the national transportation policy[4] was correctly interpreted by the Interstate Commerce Commission.

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[4] This statement of policy prefaces the Interstate Commerce Act, 24 Stat. 379 (1887), as amended; 49 U.S.C. §1, *et seq.*, and reads as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

The language quoted by appellants from the Commission's report to support the stated question relates to an interpretation of Section 5(2) of the Interstate Commerce Act, not of the national transportation policy.

The statement of the Commission to which appellants take exception is that Section 5(2) does not "contemplate the unification of only those railroads which can no longer continue under separate ownership," the Commission thereafter reasserting its administrative interpretation of that section rendered in *Detroit, T. & I. R. Co. Control*, 275 I. C. C. 455, 489 (1950), that it is designed to "foster and promote the voluntary union of carriers into a sound and adequate transportation system for the future, and such union is permissible if it is otherwise consistent with the public interest."

The purpose of the law contained in Section 5(2) of the Interstate Commerce Act was clearly stated by this Court in *United States* v. *Lowden*, 308 U. S. 225, 232 (1939), as follows:

> ". . . As a result of the enactment of the Transportation Act in 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy . . . The policy of consolidation is so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other."

Transportation Act, 1920,[7] made major revisions in the Interstate Commerce Act. *Wisconsin R.R.Comm. v. C.B.& Q.R.R.Co.*, 257 U. S. 563, 585 (1922); *New England Divisions Case*, 261 U. S. 184, 189-190 (1923); and *Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456, 478 (1924).

By the Transportation Act of 1940,[8] Section 5 of the Interstate Commerce Act underwent a major revision (what is now Section 5(2) was, prior to 1940, Section 5(4)), but it was not one which made any change in the law's purpose to favor and foster carrier consolidations. It was a change, as this Court subsequently explained in *Schwabacher v. United States*, 334 U. S. 182 (1948), to substitute "voluntary plans of merger or consolidation" for a nationwide plan of consolidations charted by the Commission under a directive of the Congress.

All provisions of the Act must be administered "with a view to carrying out" the national transportation policy, which, among other things, looks to the promotion of "safe, adequate, economical, and efficient service" and calls upon the Commission "to foster sound economic conditions in transportation and among the several carriers." The action of the Commission in this case was strictly in keeping with that mandate. This is shown in the findings of fact of the court below, which include the following:

> "10. The Commission concluded that 'the merger would enhance the adequacy of service by

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[7] 41 Stat. 456 (1920).
[8] 54 Stat. 898 (1940).

the merged companies, and would constitute the best use of the facilities' of the involved companies; that savings approximating $3,243,123 per annum—and probably more—may be expected from the merger; that such 'savings and improved efficiency of operation necessarily would strengthen the applicants, and render them capable of better service'; that 'Applicants have spent vast sums of money in improvements to their equipment and plant'; that additional large improvements are in contemplation, but that 'Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger'; and that 'anticipated accomplishments from the merger would give assurance of a stronger and financially more stable railroad.' " (p. 6, typewritten copy of decision; pp. 5a-6a, Appendix A, Appellants' Jurisdictional Statement)

Appellants have persisted in asserting (pp. 15, 17) that the involved merger is one of "two strong railroads"—in the face of the fact that the record clearly shows that this is not the case.[9] Appellants here

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[9]The record clearly shows that the N.C.& St.L. had proved vulnerable to adversity. It had a very difficult time during the depression years, as appears in Ex. H-10, sheet 1 (Tr. 427-8, 461), Ex. H-20, sheets 9-12 (Tr. 862. 902), and Ex. H-22, sheet 1 (Tr. 971, 1005). Thus, Ex. H-10, sheet 1 (Tr. 427-8, 461), shows that the N.C.& St.L. operated at a deficit in 1931, 1932, 1933, 1934, 1935 and 1937 and had earnings of only 20 cents a share in 1936 and 56 cents a share in 1938. The L.& N. results are shown to have been much superior to those of the N.C.& St.L. in that period, the L.& N.'s only deficit having been in 1932.

The two railroads experienced a 58-day strike in 1955 and the come-back of the N.C.& St.L. was a slow, stunned one. Please see pp. 468-469 of 295 I. C. C. 457 and Tr. 34-35, 186-187, 434-435 and 810.

(Footnote continued on following page)

endeavor to support the assertion by the rather devious process of quoting the Commission's statement of their own contention that the "Tennessee Company is not a weak railroad" (p. 14), by then stating that in its assailed interpretation of Section 5(2) of the Interstate Commerce Act the Commission "did not question the premise that the N & C is not a weak railroad" (p. 14) and by then quoting one finding of the

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The record further shows that the L.& N. as owner of approximately 75% of the N.C.& St.L. stock, had aided the N.C.& St.L. materially in many ways. Thus the Commission found (295 I. C. C. 457) that the L.& N. guaranteed the N.C.& St.L. bonded indebtedness with its own strong credit (p. 464); that it enabled the latter to eliminate the burden of operating a dining car department (p. 468); and that it consistently endeavored to build up and contribute substantially to the traffic of the N.C.& St.L. "often at sacrifices to itself" (pp. 477 and 484). As the Commission also found, more than one-third of the N.C.& St.L.'s important interline traffic was interchanged with the L.& N., a heavy originator of traffic (p. 465). The record further shows that the N.C.& St.L. had no financial department, all the work of such department being done by the L.& N.'s financial department at no cost whatever to the N.C.& St.L. (Tr. 435); that at sacrifices to itself the L.& N. established superior passenger service in a manner that would most benefit the N.C.& St.L. (Tr. 163-164); and that the L.& N. worked diligently to locate new industry on the lines of the N.C.& St.L., a great new Ford plant having recently been located at Nashville on the line of the N.C.& St.L. (Tr. 610-614, 617-619). Yet, for all this help given the N.C.& St.L. by the L.& N., the record (Ex. H-64) shows that not once in the ten-year period 1945-1954 did the N.C.& St.L.'s rate of return on net property investment reach 5%; that in only three years did it reach 4%; that in four years it was less than 3%; and that in two years it was less than 2%.

How low these rates of return are may be appreciated in the light of the following expression from *Alabama Public Service Comn.* v. *Southern Bell T. & T. Co.*, 42 So. 2d 655, 672 (1949):

> "We say again that the rate of return of 4.5% on net investment amounts to confiscation. . . ."

(All references here and hereinafter to the abbreviation "Tr." with numbers in parentheses are to pages of the transcript of proceedings before the Commission, and all references to the abbreviation "Ex." are to exhibits in those proceedings.)

Commission that the N.C.& St. L. had shown substantial improvements in its operating results between 1946 and 1954 (p. 14). The Commission's report also shows the fact, not mentioned, that there was a sharp decline in the operating results of the N.C.& St. L. in 1955 and 1956.[1]

Appellants also assert (p. 16) that the two railroads are "naturally competitive rather than complementary"; that the Commission has found that it did not appear there "would be any immediate and direct improvement of service"; and that the language of the Commission when considered in the context of the facts means that any two connecting railroads should automatically be given permission to merge if they wish to do so, provided no other carrier objects and there is no alternative proposal under consideration. The conclusion here stated by appellants is altogether unsound and the facts as presented are misleading.

As to the appellants' conclusion, it should be said, first, that the primary statutory test in determining whether or not the Commission's approval of a proposed merger should be granted is whether the merger will be "consistent with the public interest." Section 5(2) of the Interstate Commerce Act.[2] *Schwabacher* v. *United States*, 334 U. S. 182, 194 (1948).

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[1]Please see the table at page 494 of the Commission's report (295 I. C. C. 457), in which 1955 and 1956 earnings per share—1956 earnings being estimated based on results for the first ten months of that year—are compared with earnings per share for the years 1945-1954; and the comparison in the table at page 495 of the same report.

[2]24 Stat. 380 (1887), as amended, 54 Stat. 905 (1940), 63 Stat. 485 (1949); 49 U.S.C. §5(2).

This Court has repeatedly said that the term "public interest," as used in the Interstate Commerce Act, and particularly Section 5(2) thereof, has "direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." *N. Y. Central Securities Corp.* v. *United States,* 287 U. S. 12, 25 (1932); *United States* v. *Lowden,* 308 U. S. 225, 230 (1939); *Texas* v. *United States,* 292 U. S. 522, 531 (1934); and *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944).

Determination of when a proposed merger is consistent with the public interest involves the weighing of many considerations by expert appraisers, the Interstate Commerce Commission. As this Court has plainly pointed out in *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87-88 (1944):

> ". . . Resolving these considerations [those involved in a merger case] is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation [motor carriers], but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' [citing cases]"

The very thorough and complete report of the Commission in this case shows how extensively it weighed the many pertinent considerations involved to determine whether the proposal would be consistent with the public interest. The Commission concluded:

> ". . . On the whole, we conclude that the merger would enhance the adequacy of service by the merged companies, and would constitute the best use of the facilites." (295 I. C. C. at p. 504)

Its ultimate conclusion, in the words of the statute, that the transactions involved "will be consistent with the public interest" appears shortly thereafter (p. 506).

Contrary to the assertion of the appellants that the two railroads were naturally competitive and not complementary, the Commission found:

> ". . . The physical properties of the two railroads are exceptionally well adapted to integration and unified operations.[3] . . ." (295 I. C. C. at p. 477)

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[3]A map of the two railroads, taken from the record (Ex. H-4, sheet 1, Tr. 147, 349), is reproduced herein as Appendix A. A witness for minority stockholders in opposition to the application, in the course of his testimony, volunteered: "I would like to add, I think the merger is a natural one" (Tr. 1120). Witness Dent, Vice President of the L.& N., testified:

> "In my judgment the merger is a natural one; people who have discussed the merging of railroads for many, many years have always considered the NC&StL to be a part of the L&N System. It just fits into the whole as is demonstrated by the map. There has always been the obvious gap in our system between Nashville and Atlanta, and the NC&StL just fills that gap up. . . .
>
> ". . . As to the eastern part of Tennessee, while we now operate through Knoxville, the NC&StL serves the Chattanooga and Tullahoma areas.

(Footnote continued on following page)

The Commission found also that the merger can be expected to effect savings of approximately $3,243,123 per annum.[4]

The Commission further found:

". . . . Applicants have spent vast sums of money in improvements to their equipment and plant. Additional improvements are planned for the future, particularly with respect to expanded yard facilities at Atlanta, Birmingham and Louisville. Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger. . . ." (295 I. C. C. at p. 504)

The N.C.& St.L. was not an independent railroad. It had been controlled by the L.& N. since 1880, or for more than 75 years.[5] The L.& N. owned approximately 75% of its capital stock.[5]

"Here again the NC&StL complements our system and with the merger with the L&N we will have service to that part of Tennessee. This merger will permit us to more completely serve Tennessee and Alabama and Kentucky, the three principal states in which we now operate." (Tr. 152)

Witness Tilford, President of the L.& N., testified:

"The L&N serves the same general areas of Kentucky, Tennessee, Alabama and Georgia as are served by the NC&StL, and the two roads are complementary to each other. . . ." (Tr. 17)

[4]Pp. 491-492, 493 and 504 of 295 I. C. C. This was based on evidence of minimum savings (Ex. H-11, Part B, sheet 1, Tr. 487-8, 544), doubtful items not having been included (Tr. 170, 365, 403, 490-492, 1603), and was computed in 1955, since which time there has been, as the Court will probably take judicial notice of, another round of price and wage increases which would operate materially to augment these estimated savings.

[5]295 I. C. C. at p. 461.

The L.& N. guaranteed the N.C.& St.L. bonded indebtedness.[6] The L.& N. leased to the N.C.& St. L. an important segment of its line, including that part which enabled the N.C.& St.L. to reach the important city of Memphis,[7] metropolis of Tennessee and gateway to the West.

While the managements of the two railroads had been separate, except that the President of the L.& N. was the Chairman of the Executive Committee of the N.C.& St.L. Board, there had been close co-operation between them for many years.[8] Recent specific instances of coordinated co-operation are reflected in the construction and operation jointly at Nashville of great, modern yard facilities[9] and an adjacent modern freight station[1] for the handling of less-carload freight. A similar though smaller project is in progress at Atlanta.[2] They pooled, with the approval[3] of the Commission, their less-carload freight between Nashville and Memphis.

Railroad mergers have been the subject of exhaustive public studies. Every major study that has been made has treated the L.& N. and N.C.& St.L. as though they naturally belong together. Professor Ripley; of

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[6]295 I. C. C. at p. 464.

[7]295 I. C. C. at p. 462. The portion of the N.C.& St. L. line here referred to is that shown in yellow in Appendix A.

[8]295 I.C.C. at pp. 477, 486 and 504.

[9]Costing approximately $15 million to build (Tr. 19, 39).

[1]Costing nearly $1 million to build (Tr. 39).

[2]Tr. 53-54.

[3]*Pooling, Less than Carload Traffic, Nashville & Memphis*, 291 I. C. C. 79 (1953).

Harvard University, so treated them in his plan,[4] created for the Interstate Commerce Commission, following the original enactment[5] of Section 5(2), *et seq.* The Interstate Commerce Commission so treated them, first in its tentative plan, and later in its adopted plan, made pursuant to that enactment.[6] Other plans which have so treated them were the Prince[7] and Oldham[8] plans.

During Government operation of railroads in World War I, the L.& N. and the N.C.& St.L. were placed under a single Federal Manager.[9]

The record before the Commission shows[10] that railroads are extremely hard-pressed by governmentally-subsidized competition and that the position of the involved railroads, along with that of the railroad industry generally, is steadily becoming more difficult as government continues to spend increasingly large amounts in aid of transportation by airway, waterway,

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[4]Set forth as an appendix to the Commission's report in *Consolidation of Railroads*, 63 I. C. C. 455 (1921), such appendix commencing at page 465 and running through page 660. See page 651 where N.C.& St.L. is proposed as part of A.C.L.-L.& N. system.

[5]In Transportation Act, 1920, 41 Stat. 456 (1920). Please see 295 I. C. C. p. 478.

[6]Please see 63 I. C. C. 455, 460—System No. 11, A.C.L.-L.& N., places L.& N. and N.C.& St.L. together; and 159 I. C. C. 522, 534 (1929)—System No. 8, A.C.L., places L.& N. and N.C.& St.L. together. Please see also 295 I. C. C. at p. 478.

[7]Plan of F. H. Prince, Senate Document No. 119, 73rd Congress, 2d Session, dated January 11, 1934, pages 21-29, "Grand Consolidation Plans."

[8]Plan of John E. Oldham. Congressional hearings in 1926 on H.R. 11212, pages 165-514, and maps.

[9]295 I. C. C. at p. 478.

[10]Tr. 22-31, 175-184, 1212; Ex. H-3, sheets 1-3 (Tr. 25, 289), Ex. H-4, sheets 7-18 (Tr. 147, 349).

and highway, as regulatory and tax laws continue to discriminate against the railroads, and as wage and price levels continue to mount. The result has been great diversion of traffic from the railroads and a steadily shrinking proportion of the total intercity traffic handled by the railroads.[2] After a reference to such facts at pages 467-468 of the Commission's decision (295 I. C. C. 457)—they are further developed at pages 474-476 thereof—the Commission stated:

> "The foregoing reflects how imperative it is for the railroads to do everything in their power to enhance their competitive situation through all possible economies and efficient operations. The proposed merger is designed to accomplish that result." (295 I. C. C. at p. 468)

No railroad in the involved territory, or elsewhere, protested to the Commission against the proposed merger. Two interested railroads, the C.& E.I.[3] and the T.A.& G.,[4] strongly supported it.[5]

No other form of transportation—no motor carrier or water carrier or any other carrier—interposed any objection to it.[6]

Shippers from all over the territory involved came forward, during the course of the hearing before the

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[2]Tr. 28; Ex. H-3, sheet 3 (Tr. 25, 289) Ex. H-4, sheet 12 (Tr. 147, 349).

[3]Chicago & Eastern Illinois Railroad.

[4]Tennessee, Alabama & Georgia Railway Company.

[5]Tr. 960, 1626-1644; 295 I. C. C. at pp. 480-481.

[6]295 I. C. C. at p. 488.

Commission, supporting the merger.[7] The outstanding shipper associations in the involved territory[8] unanimously endorsed it and sent witnesses to testify to this fact.

The only shippers anywhere to oppose the merger were seven shippers located at Nashville,[9] and even at Nashville some shippers supported it.[1]

Finally, the reference cited by appellants to a finding of the Commission of no "immediate or direct" service improvement must be read in connection with the following finding of the Commission:

> ". . .. it is our view that the accompanying savings and improved efficfency of operation necessarily would strengthen the applicants, and render them capable of better service. This we find should, in the long run, result in improvement of the service which they otherwise would be able to render. . ." (295 I. C. C. at p. 504)

Furthermore, the Commission, in the excerpt quoted above and in the language quoted by appellants, used the term "service" in a narrow sense, as referring to such things as expedition and frequency of train movements; for the Commission elsewhere found that other advantages to shippers, which are properly to be called service advantages in a broader sense, would immedi-

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[7]295 I. C. C. at pp. 479-480. Their testimony may be found at Tr. 462-486, 622-646, 661-766, 1492-1516, 1559-1575, 1583-1587. One shipper (Armour & Company) presenting a witness has 42 plants and 49 branch houses located throughout the area served by the L.& N. and N.C.& St.L. (Tr. 764-766).

[8]Tr. 545-546, 649, 656-657.

[9]Tr. 1352-1415, 1469-1472.

[1]295 I. C. C. at p. 479; Tr. 1492-1516, 1559-1575, 1583-1587.

ately accrue. Among the numerous reasons recited by commercial interests in the territory for supporting the proposal are the following:

> ". . . that a much larger car supply would be made available to shippers now located on the lines of the Tennessee Company; that the tracing of cars would be simplified in a single responsibility; and that the industrial development of the tributary territory would be enhanced materially by the merger." (295 I. C. C. at pp. 479-480)

As to the first of these considerations the Commission made this express finding:

> ". . . points now local to the Tennessee Company would have access to a larger territory by single-line railroad service, and would have access to a larger car supply." (295 I. C. C. at p. 469)

The record shows that the L.& N. has the largest car supply of any railroad in the South—approximately 61,000 cars as compared with a car ownership of approximately 7,000 cars by the N.C.& St.L.[2]

The significance of this to the shipper was explained in the testimony of a shipper of clay located on the N.C.& St.L. in West Tennessee, who testified that he had found it necessary to haul his shipments a minimum of ten miles by truck, "in order to get the proper car service"[3]—from the L.& N. The following is from the cross-examination of the witness:

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[2]Tr. 357.
[3]Tr. 694.

"Q. Well, then, why is the necessity of trucking the stuff ten miles?

A. Because on many, many instances we have been out of cars on the NC and the L&N could service us and did service us, so we moved there where we could not in Gleason." (Tr. 709)

As to the second consideration, *i.e.*, relating to the tracing of shipments, a witness, the manager of the Transportation Department of Armour & Company, after testifying that his Company had 42 plants and 49 branch houses[4] in the involved territory, gave as one reason for his support of the merger:

". . . we ship a considerable amount of perishable product[s], carloads. From the time that car leaves the plant until it arrives at its destination, we trace each and every car. We do that for our own benefit. Late arrivals can mean off-condition product. This would mean that we would have one less carrier to contact and based on 20,000 cars a year that is a considerable amount of time that we would save." (Tr. 765)

As to the third consideration mentioned, the Commission found:

"The merger will enable the joint properties to engage in a broader and more intensive effort to develop the territory with respect to the location of industries. If and when the two roads are combined, a greater territory and a greater number of choice sites will be available to industries desiring to locate on the surviving company line.

[4]Tr. 764.

> The general disposition of industries is to locate on a large rather than on small lines, and with the properties merged, a much wider choice of industrial sites will be offered the public. . . ." (295 I. C. C. at p. 477)

Thus it will be seen that the merger promises, as the Commission has found, improvements in service, both immediate and prospective; that neither the record nor the Commission's findings support the proposition that the involved railroads are "naturally competitive rather than complementary"; and the findings of the Commission, in the circumstances of this case, that the proposed merger will be consistent with the public interest by no means justify the conclusion, urged by appellants, that any two connecting carriers should automatically be given permission to merge provided no other carrier objects and no alternative proposal is under consideration.

All of the foregoing considerations lead straight and surely to the conclusion, it is respectfully submitted, that Question 1 is utterly devoid of substantial character.

Question 2 Presents No Substantial Question.

Appellants' Question 2 is whether the record shows the existence of an unlawful combination in violation of the Sherman Act and, if a violation has been shown, whether it is a proper consideration for the Commission in passing on the question of whether its approval should be given to a proposed merger.

A proceeding before the Commission for authority to merge one carrier into another is in no sense a proper place for a determination of the question whether there has been a violation of the Sherman Act. The courts and not the Commission have authority to determine such a question, which can be raised only in a suit instituted by the United States, acting through its district attorneys (15 U.S.C. §4),[5] or in a civil action for treble damages in a United States District Court (15 U.S.C. §15).[6]

The following is from the transcript of the proceeding in the court below:

> "Judge Darr: . . . I would like to ask a question . . . You represent some municipal corporations, don't you?
>
> Mr. Waller: I represent the City of Nashville, Tennessee.
>
> Judge Darr: The City of Nashville, and you say that there have been antitrust violations going on 60 or 70 years?

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[5] 26 Stat. 209 (1890), as amended, 36 Stat. 1167 (1911).

[6] 38 Stat. 731 (1914). The appellants say (p. 24) that "the Sherman Act is a part of the transportation policy of Congress" and that "The Commission itself has recognized that this is true" in *Chesapeake & O. Ry. Co. Purchase*, 271 I. C. C. 5. The cited case concerned, not a merger, but interlocking directorates, and not the Sherman Act but Section 7 of the Clayton Act, concerning which the Commission is given specific responsibilities by Section 11 of the Clayton Act. The Commission pointed out that if a merger were sought (as is sought here), entirely different considerations would govern, saying (pp. 41-42):

> "If the applicants are firmly of the opinion that the proposed association will result in the benefits to the carriers and to the public which they contend we should find on the showing that they have made in this proceeding, there is no reason why they should not file an application for some form of association under section 5(2) of the act."

Mr. Waller: Yes, sir.

Judge Darr: Has your client taken any interest in seeing that these violations were abated?

Mr. Waller: I think that is a matter—

Judge Darr: (interrupting) Has it taken any interest on up to this merger?

Mr. Waller: I think that is a matter for the Department of Justice, Your Honor.

Judge Darr: Not necessarily. They can be civil.

Mr. Waller: Only, I think, Your Honor, on a civil case for damages. I don't think that anyone other than the Department of Justice could bring a criminal action or an equity—

Judge Darr: (interrupting) Well, have they taken any interest in interesting the Department of Justice in it?

Mr. Waller: Now, I would like to talk a little bit about the Department of Justice if I may.

Judge Darr: All right, you can dodge the question if you want to. Go ahead.

Mr. Waller: I can't answer for the Department of Justice except that I want—

Judge Darr: (interrupting) I was asking about your client. Has your client taken any interest to abate what you say was a violation of the antitrust laws for 60 or 70 years?

Mr. Waller: I don't know, Your Honor, whether it has or not.

Judge Darr: Right here in the City of Nashville?

Mr. Waller: I don't know whether it has or not. I am special counsel for the City, and if the City of Nashville has ever appealed to the De-

partment of Justice in connection with this case, I don't know it. I do think that my associate—

Judge Darr: (interrupting) I don't know that that is controlling, but I just wondered why, if it has been going on here so long, they haven't done something about it.

Mr. Waller: I think my associate in this case, Mr. La Roe who is now dead, did write a letter to the Department of Justice when this merger case came up.

Judge Darr: I mean before the merger.

Mr. Waller: So far as I know, there has been no action taken by the Department of Justice or by anybody else.

Judge Darr: The City of Nashville has not taken any interest in going to the Antitrust Division of the Department to say that these Railroads are violating the antitrust law?

Mr. Waller: Not so far as I know.

Judge Darr: All right." (R. 29-31)[7]

Counsel for the Department of Justice appeared in the court below and made the following statement:

"Mr. McConnell: May it please the Court, I am from the Department of Justice, and I do not have anything to add to what has been said today.

"I would just like to make this brief statement because it has been referred to: Of course, the City of Nashville and others of the plaintiffs did represent to the Department of Justice, to the Antitrust Division, the Assistant Attorney General, Antitrust, that this merger would affect com-

[7]References here and hereinafter to numbers in parentheses preceded by the letter "R." are to pages of the transcript of the proceedings before the three-judge court.

petition and that it is contrary to the antitrust policy.

"The matter was gone into thoroughly, and the Assistant Attorney General, Antitrust, wrote a letter to the Chairman of the Interstate Commerce Commission, calling his attention to those antitrust implications in the case and asked the Commission to bear them in mind very carefully. When the report came out, it was perfectly evident that the Commission did throughout consider those aspects of the case.

"With respect to the other features of the thing which relate to the antitrust laws, the fact that allegations are here made that for a number of years in the past there have been statutory violations, in that connection, I would really like to make one comment. An antitrust case, as Your Honors so well know, is a very complicated thing, and involves tremendous issues of law and fact. It takes a long time to go into such an inquiry, and a collateral inquiry of that sort could not be made in this case by the Commission itself. It did consider those aspects of the matter.

"It has been common knowledge for 75 years that there was this close working arrangement between the two roads. It's interesting that during those 75 years there have been vigorous antitrust programs a lot of times directed directly at the railroads. President Roosevelt, for example, that was one of his prime programs, and you have had men like Justice Jackson and others there. The only thing that I can say is that no proceeding was ever brought.

"In any event, we reviewed this record carefully, with extreme care, and under all the cir-

cumstances of the case, it is our feeling that the Commission was acting well within its statutory power and gave unusually close attention to all aspects of this matter, and we think the order is valid and that the action should be dismissed." (R. 160-161)

The specific wording of the Interstate Commerce Act, and the specific rulings of this Court, provide even more precise answers to the contention of the appellants that the Commission should have made a determination that there has been a violation of the Sherman Act and that, having so found, it should have weighed this consideration against approval of the merger.

Paragraph (11) of Section 5,[8] under which section the Commission proceeded in this case, provides in material part:

> "The authority conferred by this section shall be exclusive and plenary . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws . . ."

In *McLean Trucking Co.* v. *United States, supra,* it was held that this plain language of paragraph (11) of Section 5 of the Act permits the Commission to approve a merger which would, if not approved by the Commission with the consonant exemption under the Act, violate the anti-trust laws, and *United States* v.

[8] 54 Stat. 908 (1940); 49 U.S.C. §5(11).

Southern Pacific Co., 259 U. S. 214 (1922), and later developments thereof, to be detailed hereinafter, stand for the proposition that the similar provision of the Act as it then read rendered unimportant to a Commission decision a past violation of the antitrust laws.

In the *McLean Trucking Co.* case, this Court had before it, in a merger case, the same sort of question which the City raises here, namely, that the Commission applied an erroneous standard in determining the propriety of the merger, the alleged error being that it failed to give due weight to the antitrust laws. The Court thus stated the contention:

> "The chief attack on the orders is that the Commission improperly construed the standards by which Congress intended it to determine the propriety of a consolidation; and the burden of this complaint is that it did so 'by failing to consider and give due weight to the anti-trust and other laws of the United States.' The argument seems to be that the merger, notwithstanding the Commission's approval, violates the Sherman Act; hence the Commission is without power to approve the merger. This presupposes that Congress did not intend, by enacting the specific exemption of Section 5(11), to give the Commission leeway to approve any merger which, but for the exemption and the Commission's approval, would run afoul of the antitrust laws. . . . ." (321 U. S. 67, 77-78)

The Court then (321 U. S. at p. 79) rejected it in this sweeping language:

". . . It is not for this Court, or any other, to override a policy, or an exemption from one, so clearly and specifically declared by Congress, whatever may be our views of the wisdom of its action. The argument in its full sweep therefore must be rejected. . . ."

The Court thereafter very pointedly said (321 U. S. at p. 85) "that the Commission is *not to measure proposals for all-rail or all-motor consolidations by the standards of the antitrust laws.*" (Italics ours)

Continuing, it said of the action of Congress:

". . . And *in authorizing those consolidations it did not import the general policies of the antitrust laws as a measure of their permissibility.* It in terms relieved participants in appropriate mergers from the requirements of those laws. Sec. 5(11). In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed. . . ." (321 U. S. at p. 85) (Italics ours)

Summarizing the duty of the Commission in appraising the effect of a merger on competition the Court said:

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation,

lower costs, etc., to determine whether the consolidation will 'assist in effectuating the over-all transportation policy.'" (321 U. S. at p. 87)

Here the Commission gave much consideration to Nashville's contentions[9] and ruled:

"Necessarily the effect of the transaction upon competition constitutes an important factor to be considered, and the record establishes beyond a doubt that the proposed merger will reduce competition throughout the affected area. However, this fact does not necessarily preclude its approval. Our task is to 'estimate the scope and appraise the effects of the curtailment of competition which will result . . . and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.' *McLean Trucking Co.* v. *United States*, 321 U. S. 67. The record makes clear that, except for the area served by Nashville, this is not a case involving service through an area which in general suffers from a paucity of through competitive routes. . . ." (295 I. C. C. at p. 503)

And:

". . . We conclude from the record that the merger would strengthen the resulting system and make it more capable of rendering effective competition with the other railroads serving the South Atlantic coastal area. We find that the reduction in competition resulting from the merger would be consistent with the public interest." (295 I. C. C. at p. 488)

[9] 295 I. C. C. at pp. 481-482 and 503.

Not only did the Commission consider the effect of the proposed merger upon the competitive situation actually existing between the two railroads (pp. 485-486), but it also considered the effect of the merger upon competition if they were "truly competitive," saying:

> ". . . But, even approaching this problem from the standpoint that the applicants are truly competitive, it is our view and we find that for the reasons herein set forth the advantages to the public interest from the merger outweigh the disadvantage to the single locality of Nashville . . ." (295 I. C. C. at p. 504)

The antitrust objections were pressed with far greater vigor in the *McLean* case than they have been or could be in this one. Yet the Commission's action approving the merger there involved was held to be proper both by the District Court and by the Supreme Court.

In the *McLean* case, the Antitrust Division of the Department of Justice appeared before the Commission and opposed the merger.[1] When the Commission approved the merger in the *McLean* case and an action was brought to set aside the Commission's order, the United States confessed error.[2] As a result of the merger approved in the *McLean* case, Associated Transport, Inc., became the largest motor carrier in the United States in terms of estimated revenue.[3] In

[1] 321 U. S. at p. 69.
[2] *Ibid.*
[3] 321 U. S. at p. 71.

this case, the Commission found that the L.& N. ranked fourteenth among railroads in terms of gross revenues and that by reason of the merger it would advance only one rank, to thirteenth place, still below its two principal competitors, the Illinois Central and the Southern Railway.[4]

The case of *United States* v. *Southern Pacific Co., supra,* and subsequent developments before the Commission[5] and in the District Court,[6] go a step beyond the *McLean* case and hold that even where there has been a direct judicial *determination* that a violation of the antitrust laws has existed—as distinguished from the mere collateral *allegation* of a violation as in the *McLean* case and in this one—subsequent approval of the condemned transaction by the Commission under Section 5(2) of the Interstate Commerce Act grants relief from the antitrust laws.

In that case this Court found that the Southern Pacific, by acquiring control of the Central Pacific, had violated the Sherman Act. The Court directed that a decree be entered terminating the existing control and separating the two properties. Following issuance of the mandate of this Court, the Southern Pacific filed an application with the Commission for authority under Section 5(2) of the Interstate Commerce Act to acquire control of the Central Pacific despite the decree of this Court. The application was

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[4]295 I. C. C. at pp. 462-463.

[5]*Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508 (1923).

[6]*United States* v. *Southern Pacific Co.*, 290 Fed. 443 (1923).

approved by the Commission. The Commission said[1] that "[w]e must recognize as settled" that the acquisition of control of the Central Pacific by the Southern Pacific "was in violation of the Sherman Act." It said, further, that "if that were the only question before us, we would not have any function to perform" inasmuch as "we must recognize the finality of a court decree upon the questions with which it deals."

Continuing, the Commission said:

> ". . . There is nothing in section 5, however, indicating that the Congress intended that we should refuse to accept jurisdiction upon the ground, solely, that a proposed acquisition of control would violate the Sherman law. . . . When by our order based upon broad considerations of the public interest we in effect grant relief against antitrust laws, and other restraints and prohibitions, by law, we are exercising a power which the statute gives to us alone. Evidence as to public benefits to be derived from common control of competing carriers, which would be immaterial in a prosecution under the Sherman Act, might be entirely pertinent in a proceeding before us under paragraph (2). . . ." (76 I. C. C. at p. 516)

The Commission found that operation of the Central Pacific as a separate carrier would "disrupt existing routes and service" (p. 518); result in "increased cost of operation and duplication of capital investment" and "increased cost of operation" (p. 519); and render it doubtful that the Central Pacific,

[1] 76 I. C. C. at p. 515.

independently operated, "would have the earning capacity, credit, and financial ability" to meet its fixed charges and acquire new equipment and make improvements (p. 519). The Commission, therefore, approved the application.

The three-judge court sitting as the District Court for the District of Utah approved the Commission's action, saying:

> ". . . The prior unlawful control with which the mandatory requirements of the decision of the Supreme Court were intended to deal has now been succeeded by a situation and relation between the two railways which is lawful, and the executory and directory provisions of said mandate have thus been satisfied or rendered inoperative." (290 Fed. at p. 450)

Appellants incorrectly assert (p. 19) that the contention of the involved railroads has been that the alleged destruction of competition in 1880 makes lawful a continuing destruction of competition since then. They have never advanced any such contention. Their contentions have consistently been, as we have stated them herein, that it is not the function of the Commission to determine whether there has been a violation of the Sherman Act, that no Sherman Act violation has been shown because it could only be shown through a judicial determination by a Federal Court in a case presenting such an issue, and that appellants have proceeded on the wholly erroneous premise that a Sherman Act violation can be *assumed* by the Commission or by a court reviewing an order

of the Commission. Appellants do assume it—by their assertion that there has been a continuing violation of the Sherman Act—but such assumption manifestly will not make it a fact.

Clearly, then, there is no substance to appellants' Question 2. This may be seen further from another point of view.

The appellants concede (p. 22) that the Commission has power to approve, as consistent with the public interest, the control of one railroad by another, even though such control would eliminate competition; but they would distinguish the Commission's power in control cases from its power where a merger is involved. What appellants do not seem to realize is that the same section of the Interstate Commerce Act[8] which authorizes the Commission to approve the acquisition of control likewise authorizes it to approve a merger of two carriers.

The appellants likewise concede (pp. 25-26) that the Commission gave consideration to the effect of the merger upon competition. While they seek to minimize the extent of the Commission's consideration of that subject, the fact is that the Commission gave it full consideration, saying (295 I. C. C. at p. 503):

> "Necessarily the effect of the transaction upon competition constitutes an important factor to be considered. . . ."

Thus, the effect of the concessions of the appellants is also to demonstrate that there is no substance to Question 2.

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[8] 54 Stat. 905 (1940); 49 U.S.C. §5(2).

Question 3 Presents No Substantial Question.

Question 3 presented by appellants is a double-barreled affair. It is in fact two questions, the first being whether Section 5(2)(c) was correctly interpreted by the Commission and the second whether the District Court should have dismissed the action in view of the fact that its approval was stated as being "upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway Company shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved herein, disclosed in finding of fact Number 15" (p. 14, typewritten copy of decision; p. 13a, Appendix A, Appellants' Jurisdictional Statement).

The two questions are equally without substantiality.

As to the former, no interpretation of Section 5(2)(c) by the Commission is cited, and no interpretation thereof appears in the Commission's report. What appellants really mean by their complaint about interpretation appears when they say (p. 28) "the Commission erred in not following its own precedent," the precedent referred to being the decision of the Commission in *Fort Worth & D.C. Ry. Co. Lease*, 247

I. C. C. 119 (1941), which represents, they say (p. 28), a correct application of Section 5(2)(c).

How thoroughly devoid of merit this proposition is may be seen in the fact that it is well settled that a lack of consistency in the decisions of the Commission is no ground for attack; and in the fact that the cited decision, although properly distinguishable, and properly distinguished by the Commission, from the instant case, has never been followed by the Commission as a precedent and is not a reliable precedent being, among other things, at variance with the legislative history of Section 5(2)(f).

As long as the Commission's decision in the instant case is correct it is no valid objection to it that it is at variance with a decision in a prior case. This point has often been squarely decided, a comparatively recent decision being that of a three-judge court for the District of Massachusetts in *M. & M. Transportation Co. v. United States*, 128 F. Supp. 296 (1955), which was affirmed at 350 U. S. 857 (1955).

In that case the Commission, acting under Section 5(2) of the Interstate Commerce Act, had authorized one motor carrier to acquire the operating rights of another. Two competing motor carriers attacked the order on the ground, among others, that it was contrary to prior Commission decisions in other cases. The petitioners especially relied upon *Pacific Intermountain Express Co.—Control and Purchase*, 57 M. C. C. 341 (1950). The District Court first pointed out that on rehearing and in a subsequent case, the Commission

had "limited the application of the Pacific Intermountain Express decision." It then said:

> ". . . Third, even if the latter case had not been limited by later decisions, the asserted inconsistency between the instant result and that in the Pacific Intermountain Express case would not require setting aside the Commission order. The courts have many times held that the findings of the Commission may not be attacked because they are inconsistent with findings made in other cases. [Citing cases] . . . Where, as in the instant case, the findings are on their face adequate and explain the basis for decision, there is no occasion to examine consistency with prior decisions. . . ." (128 F. Supp. at p. 301)

Referring to the *Fort Worth & D.C. Ry. Co. Lease* case, the Commission, in its decision in the instant case. said:

> ". . . The cited case involved a lease of the Fort Worth & Denver City Railway Company by The Colorado and Southern Railway Company. It differed from the instant case in that initial control was to be attained by the lease rather than a merger of properties which have been controlled by the dominant company, through stock ownership, for more than 75 years. . . ." (295 I. C. C. at p. 501.)

This statement is precisely correct and expresses a very proper distinction between the two cases. But, as indicated, what the appellants complain of is that *Fort Worth* decision was not accepted as controlling this case.

So far as we have been able to find, the *Fort Worth* case is the only case ever decided by the Commission where the effect of a proposed acquisition on the employees involved appears to have been a controlling consideration in the denial of an application under Section 5(2) of the Interstate Commerce Act. That decision has never been followed, or cited as authority, in any other case.

In deciding that case the Commissioners were sharply divided, the distinguished Commissioner Eastman having vigorously dissented. Three other Commissioners also dissented. Only four joined in the expression of the majority, two others merely registering concurrence in the result.

The facts there were widely different from those in this case, in many respects. This is shown in detail in applicants' Reply to Exceptions.[9] Among other things, the Commission there said that approval of the proposed acquisition might be expected to result in both roads involved being operated at a loss (247 I. C. C. at p. 127), which could not be, and was not found to be, the case here. Again, it was found there that the contemplated savings from the proposed action were doubtful (p. 127), whereas here there are express findings[1] that large savings can be realized. In that case there was no area-wide support for the acquisition, whereas here there was.[2]

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[9]Pp. 68-70, this reply being appended as an exhibit to our Answer to the Complaint.

[1]295 I. C. C. at pp. 491-492, 493, 504.

[2]295 I. C. C. at pp. 479-480.

The rule that has been employed in other cases since the decision in the *Fort Worth* case is that expressed by the Commission in *St. Louis S.W. Ry. Co. of Texas Lease,* 290 I. C. C. 205, 213-214 (1953), as follows:

> "At the hearing, representatives of railroad labor organizations objected generally to the proposed lease because of the adverse effect on employees which would result by the elimination of positions of certain employees and the change in the place of work which will be required of numerous other employees. If such considerations alone would warrant rejection of a proposed unification of railroad properties under section 5(2) of the act, approval could be given only in those instances in which no savings would be effected. To permit railroad unifications and at the same time avoid or alleviate hardships that otherwise would be inflicted upon employees, there was enacted section 5(2)(f) of the act. . . ."

The history of Section 5(2)(f) was reviewed by this Court in *Railway Labor Assn.* v. *United States,* 339 U. S. 142, 146-153 (1950). Therein it was said:

> "The second sentence of 5(2)(f) has a significant history of its own. On the floor of the House, Representative Harrington suggested the following proviso to follow the first sentence:
>
> > '*Provided, however,* That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.[3]

[3]A footnote at this point cites 84 Cong. Rec. Pt. 9, 9882 (1939).

"The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related.

"With the Harrington Amendment in it the bill went to conference. . . ." (339 U. S., pp. 150-151)

By a footnote at this point it was explained that while the bill was in conference the Legislative Committee of the Interstate Commerce Commission advised the Congress as follows:

"'As for the [Harrington] proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement' of 1936 between the railroad managements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees.' Interstate Commerce Commission Report on S. 2009, Omnibus Transportation Legislation, p. 67 (76th Cong., 3d Sess., House Committee Print), transmitted January 29, 1940."

Following such advice the bill was changed to the present form of Section 5(2)(f).[4]

It is plain that the purpose of Congress was that the Commission should accord protection to adversely affected employees by the imposition of just and reasonable conditions but not disapprove consolidations by reason of adverse effect on employees.

This does not mean that the Commission is not, in passing upon a railroad merger proposal, to consider "the interest of the carrier employees affected" as it is required to do by Section 5(2)(c),[5] but the action of

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[4]It reading:

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." (54 Stat. 906 1940); 49 U. S. C. §5(2)(f))

[5]It reading:

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public

(Footnote continued on following page)

Congress made clear beyond peradventure that that requirement in Section 5(2)(c) was not to be regarded as an overriding and decisive consideration.

The Commission in this case manifested great concern for the affected employees and after weighing both Section 5(2)(c) and Section 5(2)(f),* dealt with such employees most generously, the employee-protection provisions being properly described by it as follows:

> "It is generally conceded that the conditions recommended by the examiner, and which we hereby adopt, are more favorable than any heretofore imposed in merger cases. . . ." (295 I. C. C. at p. 502)

These conditions provide a minimum of four years' profection to a dismissed employee who has a service record as long as four years, *i. e.*, for at least four years from the effective date of the Commission's order he is assured of being in no worse position, paywise, than he was at that time. The issuance of a temporary restraining order by Judge Martin in this case, which was in effect from April 8 to June 20, 1957, and the issuance of a new order by the Commission to become effective August 14, 1957, operated, as a practical matter, to extend that period of protection.

As to those employees who are required to move, their moving expenses are to be borne by the L. & N.,

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interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." (54 Stat. 906 (1940); 49 U.S.C. §5(2)(c))

*295 I. C. C. at pp. 500-503.

and they are protected against loss from the sale of a home or from cancellation of a residential lease.[7]

And there are other prescribed fringe benefits of substantial value.[8]

The argument of appellants on this subject comes down to just this: that the merger should have been disapproved because it would result in less employment—which means of course that the law on railroad mergers should be so administered by the Interstate Commerce Commission as to require applicants to retain indefinitely unneeded employees in unneeded jobs thereby preventing the railroads from effecting needed economies.

The Interstate Commerce Act as a whole, commencing with the declaration of the national transportation policy[9] which enjoins upon the Commission administration of all the provisions of the Act in a manner calculated to produce, among other things, "economical

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[7]Furthermore, there are job opportunities incident to becoming a part of a larger and financially stronger and more stable railroad organization. This was recognized and declared by the Commission in *Florida East Coast Ry. Co. Reorganization*, 267 I. C. C. 295, 326 (1947).

[8]"No employee affected by the transaction approved herein shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough, as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained." *Oklahoma Ry. Co. Trustees Abandonment*, 257 I. C. C. 177, 199 (1944).

Adopted by the Commission in this case at 295 I. C. C. at p. 502.

[9]54 Stat. 899 (1940); 49 U.S.C., preceding §1.

and efficient service," cries out against any such construction of Section 5(2).

The result of what is sought would, of course, only be to handicap the railroads in their efforts to compete against the most difficult kind of competition, government-aided competition, and in the long run could only hurt, rather than help, railroad employment.

The national transportation policy calls for the administration of the Interstate Commerce Act so as, among other things, to "encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by . . . rail . . ."

Turning to the question whether the lower court erred in not dismissing the action because it included in its decision a statement to the effect that the rights of the N.C.& St.L. employees should be protected equally with those of L.& N. employees, we quote as follows the court's statement referred to:

> "The approval by this court of the order of the Interstate Commerce Commission of March 1, 1957, approving the merger upon the conditions therein stated, is based upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway Company shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved

herein, disclosed in finding of fact Number 15." (p. 14, typewritten copy of decision; p. 13A, Appendix A, Appellants' Jurisdictional Statement)

Finding of Fact No. 15, therein referred to, reads as follows:

"15. Toward the conclusion of a lengthy colloquy concerning the protection of rights of the Nashville, Chattanooga & St. Louis Railway employees, counsel for the Interstate Commerce Commission, Robert W. Ginnane, Esquire, made the statement that the Commission is without power, in connection with a reorganization, to tell carriers who shall or shall not be laid off as a result of the merger. He stated further that the Commission's power and responsibility are limited to specifying protection of those who are laid off, the choice of those laid off being left to the managerial discretion of the carriers as limited by their collective bargaining agreements. The attorney stated, moreover, that the Commission merely identifies positions which would be affected and does not undertake to state what individuals would be affected.

"The attorney for the Louisville and Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company stated that, in the merger agreement between the railroads, it is expressly provided that the Louisville and Nashville will assume any and all obligations and contracts of the Nashville, Chattanooga & St. Louis Railway Company, *including its negotiated union bargaining agreements.*" (pp. 8-9, typewritten copy of decision; p. 13a of Appendix A, Appellants' Jurisdictional Statement; Italics ours)

As stated in this finding, there was a lengthy colloquy on the question whether the Commission had undertaken to hold that only N.C.& St.L. employees —and not L.& N. employees—would be adversely affected by the merger. The sentence in the Commission's report which gave rise to the question is the following:

> "*Employees.*—According to testimony of the applicants, *jobs* of approximately 550 employees of the Nashville, Chattanooga & St. Louis would be abolished, and an additional 289 would be transferred, making a total of 839 employees affected by the proposed merger. . . ." (295 I. C. C. at p. 500; Italics ours)

It will be seen that the statement refers to "jobs" that no longer will be required; it does not say that only N.C.& St.L. employees will be adversely affected, *i. e.*, that in the merging process such employees will have no right to places in the merged company. The Commission could not have said such a thing for, as its counsel stated in the course of the proceeding before the court below:

> "Mr. Ginnane: As I read the statute and the decisions, the Commission's power and responsibility is limited to specifying the protection for those who are laid off, and that the choice as to who is to be laid off is left by the law to the managerial discretion of the carriers as limited by their collective bargaining agreements.
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> Judge Martin: That is what we have thought all through, the three of us. We conferred dur-

ing the recess. Now, here is the point, did the Commission overstep its power that you have said is limited in the writing of this order or in the statement that it made. That's what we were querying about.

Mr. Ginnane: I am completely satisfied that the Commission was just identifying the positions which would be affected and not purporting to—

Judge Martin: (interrupting) To rule on the question of which you say it had no—

Mr. Ginnane: (interrupting) (continuing)—say which individuals should retain employment and under what conditions. It seems clear to me that that is subject to the managerial discretion of the carriers as limited by their collective bargaining agreement.

Judge Martin: All right. I think that clears it up, don't you?

Judge Shelbourne: Yes." (R. 194-195)

Immediately preceding these statements was the following:

"Judge Darr: . . . As I understand, the railroad counsel in open court concedes that this order does not arbitrarily say that all persons who may be employed in the merged railroad who will be discharged will be N&C employees?

Mr. Grubbs: Absolutely, Your Honor.

Mr. Harwood:[1] It does not say that they won't be from the N&C either, Your Honor.

Judge Darr: Well, that's putting it two ways.

Judge Martin: Is there any statement that any counsel representing the L&N would like to

[1]Counsel for N.C.& St.L. Railway Employees Job Protection Association.

make about this matter or do you think that you have given us all that we need to know about it?

Mr. Keeble: If Your Honor please, I think so. It is the position of the L&N that this order of the Commission does not attempt or purport to provide that all of the dismissed or displaced employees will come from the NC&StL. That matter will be worked out under the provisions of the protective conditions set forth in the order, and also in addition to that, of course, these men represented by Mr. Harwood will have the advantage of the representation of their bargaining agent who had a representative here throughout this hearing. Nothing is being put over on them at all.

Judge Martin: May I hear from the ICC counsel?

Mr. Ginnane: May it please the Court, I am quite definitely of the opinion that the Commission is without any power in connection with the reorganization to tell the carriers who shall or who shall not be laid off as a result of the merger.

Judge Darr: That's right.

Judge Martin: That's what we thought." (R. 193-194)

It is clear that the Commission did not undertake to do otherwise, as it concluded:

". . . Under the circumstances, we will impose the same conditions for the protection of railway employees who may be adversely affected as were set forth in *New Orleans Union Passenger Terminal Case*, 282 I. C. C. 271. . . ." (295 I. C. C. at p. 501)

And:

> "It is generally conceded that the conditions recommended by the examiner, and which we hereby adopt, are more favorable than any heretofore imposed in merger cases. In view of this fact, we are convinced that any disputes as to particular employees or group of employees affected by actions of the applicants in consummating the merger may be resolved by following the procedure set forth in condition No. 8 of the conditions prescribed in *Oklahoma Ry. Co. Trustee Abandonment*, 257 I. C. C. 177, which are incorporated in the New Orleans passenger terminal conditions previously prescribed herein. That condition provides for consideration and determination by an arbitration committee of questions regarding the eligibility for protection of persons or groups elsewhere described in the conditions. . . ." (295 I. C. C. at p. 502)

In the light of these considerations, it is perfectly plain that the court below was not finding any fault with what the Commission had done but was undertaking merely to make clear and certain that its interpretation of the Commission's decision was that it did not authorize or direct any discrimination against N.C.& St.L. employees and that it was with that understanding or interpretation that the Commission's order was approved.

Certainly there is nothing here to suggest that the court below erred in dismissing the action, and certainly there is no appearance of a substantial question for determination by this court.

Question 4 Presents No Substantial Question and Improperly Raises Questions Not Raised Below.

This question, like the one immediately preceding it, is not one question. Nor is it, like the immediately preceding one, two questions. It is in fact a cluster of questions, all, however, relating to alleged procedural errors committed by the Commission. None of them presents a substantial question.

The first of this series of questions is whether the Commission erred in not issuing a *subpoena duces tecum* requested by appellants. This question was not raised in the complaint nor considered below and cannot be raised at this time. In *United States* v. *Atkinson*, 297 U. S. 157, 159 (1936), this Court said:

> ". . . examination of the record discloses that no such objection was presented to the trial court. In consequence the government is precluded from raising the question on appeal."

This is the rule consistently followed: *Chesapeake & Ohio Railway Co.* v. *McDonald*, 214 U. S. 191 (1909); *Weade* v. *Dichmann, Wright & Pugh Inc.*, 337 U. S. 801, 808 (1949); *National L.R.B.* v. *Truitt Manufacturing Co.*, 351 U. S. 149, 151 (1956).

Blended with appellants' presentation in dealing with this question is a discussion of claimed error on the part of the Commission which was raised below and ruled on as follows:

> ". . . this court holding . . . that the action of the Commission did not constitute prejudicial error:

"(a) The City of Nashville urged that the Commission should require the applicant railroads to produce certain preliminary reports concerning the merger which were made by a freight traffic manager of the Louisville and Nashville Railroad Company. The Commission stated that, although these reports were not produced by the applicants, 'extensive testimony with respect thereto was presented by interveners in opposition through former vice-president in charge of traffic for the Tennessee Company.'" (p. 11, typewritten copy of decision; pp. 10a-11a, Appendix A, Appellants' Jurisdictional Statement)

As showing how unsubstantial the attack on this ruling is, we point out that what appellants term "the original Kentucky Company traffic study" has never before been so characterized and was in fact only a preliminary, intra-departmental report; that applicants were not asked to produce this particular report but rather were requested to produce all studies and memoranda, traffic and otherwise,[2] prepared prior to the filing of the application with the Commission. Such request, made after the hearing before the Commission had gotten under way, was wholly unreasonable. It was in effect that the hearing be interrupted and applicants be required to proceed to assemble and bring forward all preliminary investigations and papers for placement in the hands of counsel for the City of Nashville. For applicants to have been required to review all of their many files, from the four corners of their properties, to strip them of such ma-

[2]Tr. 228-236.

terial and bring it forward and place it in the hands of the City's counsel would have been, as was stated on the record, "a mountainous undertaking."[3]

Consideration of the merger had gone on for many years[4] and it had been the subject of "almost . . . continuous study"[5] "over a period of years,"[6] and "intensive study" in the years 1952-1954,[7] "innumerable memoranda" having been "exchanged on the subject."[8] What the appellee did was to bring forward all the complete, final studies of every department of the railroad and present them through its chief officers.[9] In addition, upon the request of the City of Nashville, appellee (Tr. 236-237) presented the report which its President had presented to its Board of Directors, in response to the latter's request (Tr. 20) upon its management for a plan for merging the two properties.[1] Certainly no more could reasonably have been required. These witnesses were cross-examined at great length by counsel for the City and others.

The preliminary reports, called "original" study by appellants, were made by a freight traffic manager of the L.& N., a subordinate of the traffic Vice Presi-

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[3]Tr. 231.
[4]Tr. 19, 227.
[5]Tr. 233.
[6]*Ibid.*
[7]Tr. 20.
[8]Tr. 235.
[9]Appellee's counsel explained at the time:

"We bring forward to you today everything that is right up to date on this subject. We have witnesses here who can be examined at length and who will present the very latest studies and most complete studies that are available." (Tr. 231)

[1]Ex. H-5 (Tr. 236-237, 237).

dent. The final report was made by the traffic Vice President, Mr. Dent.[2] Mr. Dent was produced as a witness and presented extensive testimony,[3] including his elaborate study of the probable effect of the merger from the standpoint of the Traffic Department of the L.& N.,[4] and was cross-examined at great length.[5]

Appellants, while complaining of appellee's failure to produce such reports, quite obviously had possession of copies of them, or access to them (and therefore might themselves have placed them in the record had they really desired them to be a part of the record), because they did place the results contained therein in the record through one of their own witnesses, as appears in the Commission's report, as follows:

> ". . . The studies and reports made by the freight traffic manager of the Kentucky company, upon which the interveners in opposition so heavily rely, were not included as part of the applicants' case, but extensive testimony with respect thereto was presented by interveners in opposition through the former vice president in charge of traffic for the Tennessee company. Such studies, which dealt solely with traffic matters, showed a variance from a net traffic department loss from the merger of approximately $601,408 after Federal income taxes, contained in the first report, to a traffic department saving of $168,107 before income taxes, as contained in the third report. . . . ." (295 I. C. C. at p. 505)

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[2]Tr. 233 and 1622.

[3]Covering 202 pages of the transcript (Tr. 145-197, 295-349, 1587-1626, 1651-1704).

[4]Ex. H-4 (Tr. 147, 349).

[5]Covering 116 pages of the transcript (Tr. 295-349, 1603-1626, 1667-1703).

Appellants next (p. 33) launch into a discussion of alleged restriction of cross-examination. The Complaint raises no issue as to alleged restriction of cross-examination and the issue is therefore not properly before this Court.

What is referred to as a restriction of cross-examination was in fact a refusal on the part of the Examiner to require appellee, while a witness was on the stand and being cross-examined, to produce certain figures, showing the number of employees in the L.& N. Accounting Department in 1947, which were not readily at hand, the hearing being in Washington and the witness's office being in Louisville.

Counsel for the City of Nashville asserted at the time that he wanted these figures for comparison with figures of record showing current employment in the L.& N. Accounting Department so that he might determine whether the Department was overstaffed. Although the witness did not have the figures available, he stood ready to be cross-examined at any length on whether his Department was overstaffed.[6] Counsel for Nashville, however, refused to cross-examine him on the subject.[6]

The unwillingness of the Examiner to require the working-up and production of such figures was sustained by the Commission, and is complained of in the Complaint (Par. 7(c), pp. 8, 9), the charge being that failure to require such production constituted prejudicial error rather than that it was a denial or restriction of cross-examination.

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[6]Tr. 508.

As showing that even if the figures had been available they could have been of no probative value, the following is quoted from the record:

> "The Witness: Since that time, various states have enacted laws requiring deduction of income taxes from employees, there have been numerous other changes in accounting rules and regulations [so] that a comparison of 1947 employment and 1955 employment is absolutely worthless when you come to accounting." (Tr. 509)

Manifestly, the court below was entirely right, in such circumstances, in holding that no prejudicial error was committed by the Commission. (Conclusion of Law No. 7, pp. 11-12, typewritten copy of decision; pp. 10a-12a, Appendix A, Appellants' Jurisdictional Statement)

The next alleged error (p. 34) is also denominated a restriction on cross-examination, but it was not so referred to in the Complaint, it being there referred to (Par. 7(d), pp. 9, 10) as an error by the Examiner, sustained by the Commission, in refusing to require appellee to work up and produce for the record certain figures showing the amount of traffic interchanged between the L.& N. and the N.C.& St.L. at Nashville. The request, which was not granted, was for interchange figures for the years 1951 and 1952.[7]

The information was sought by counsel for the City of Nashville in connection with the so-called "solicitation agreement" described at pages 482-485 of the Commission's report.

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[7]Tr. 222-223.

Appellee had previously been requested and had agreed to provide the number of revenue cars moving into and out of Nashville by the L.& N. and the N.C.& St.L. during the years 1953 and 1954,[8] and had agreed further to provide the figures as to traffic interchanged at Nashville in 1953 and 1954.[9]

Appellant City of Nashville, however, has asserted that it wanted to develop the effect of an amendment made in May, 1951, on the movement of traffic via Nashville and the N.C.& St.L. Aside from the fact that it is very questionable whether such information would be at all relevant to the question whether the proposed merger was consistent with the public interest, the fact is that the figures requested could not possibly have shown what appellants say they wanted to develop, as was explained to the Commission.[1]

Appellants attack the following statement of the Commission:

> ". . . As in all applications filed under section 5(2) of the act, the burden of proof is on the applicants herein, and it is their responsibility to decide, at their own risk, the nature and kind of evidence to be presented in support of the application. The information called for in our order of October 14, 1940, with respect to such applications, may be used to guide the applicants in the matter. The applicants herein have complied with that order, and have submitted ample evidence suf-

[8]Tr. 201.

[9]Tr. 222.

[1]At pp. 218-221 of appellee's Reply to Exceptions. Please see also Tr. 1693.

ficient and adequate to sustain the material allegations contained in the application. . . ." (295 I. C. C. at p. 505)

It is surely true that an applicant, in assuming the burden of proof, proceeds in the presentation of its evidence at its own risk. The cited order of the Commission specifies the information which the Commission regards as necessary when an application is filed under Section 5(2) of the Interstate Commerce Act. The appellee not only supplied all the facts required therein—these were set forth in the application, dated January 26, 1955 (filed with the Commission on January 28, 1955)—which facts are adequate to make out a *prima facie* case for applicants (the design of the rules being that unless there is some protest the application can be decided based on the information supplied in such application), but, *in addition,* presented 38 witnesses, including its President, its traffic Vice President, its operating Vice President, its financial Vice President, its Comptroller, its Director of Personnel, its General Industrial Agent, and the Comptroller of the N.C.& St.L. and 25 witnesses representing many hundreds of affected shippers.

These witnesses dealt with every conceivable phase of the proposed merger, and their testimony and cross-examination comprise 1,221 pages of the transcript of testimony. They also presented 49 exhibits (in addition to 23 exhibits filed with the application), many of them very elaborate ones, constituting, appellee believes, one of the most complete presentations ever made before the Commission in such a case.

What appellants complain of in fact is that the Examiner and the Commission did not require appellee to furnish all the minutiae that the parties opposing the application requested. The most onerous demands or requests to supply material were made upon appellee by such opposing parties. Appellee was willing to supply, and did supply, for the record, much of the material thereby sought—Appendix B hereto lists numerous examples of requests made by those opposing the application—but it took the position that there were reasonable limits to what it should be called upon to supply—that it should not be required to supply *everything* desired by opposing parties—and in some respects it was sustained.

As showing how loathe the courts are to disturb procedural rulings of administrative agencies, we invite attention to the following from *Cella* v. *United States,* 208 F. 2d 783, 789 (1953), certiorari denied 347 U. S. 1016 (1954), where the Court (7 Cir.) said:

> ". . . in administrative hearings the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed. [Citing cases] Administrative agencies should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' . . ."

And from *Reilly* v. *Pinkus,* 338 U. S. 269 (1949), a case cited by appellants (p. 37):

> "The power to refuse enforcement of orders for error in regard to evidence should be sparingly

exercised. A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency. . . ." (p. 276)

The courts rely on the Interstate Commerce Commission for determination of the evidence it needs with which to discharge its duties in the public interest. Thus in *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 513 (1944), this Court said:

". . . The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad. . . ."

Appellants assert (p. 36) that Congress intended a proceeding of the character here involved to be adversary and not *ex parte*. We do not question this.[2] In this case, the Commission held extensive hearings and these were in no sense *ex parte*. At every step, the appellee met opposition from the appellants, and the entire proceeding before the Commission was a vigorously contested adversary proceeding. The immense record made before the Commission makes this manifest and completely refutes the appellants' contention that the proceeding was conducted in an *ex parte* fashion.

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[2]However, public hearings are not required on all railroad merger applications, the statute providing ". . . and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest." 63 Stat. 485 (1949); 49 U.S.C. §5(2)(b).

Question 5 Presents No Substantial Question.

The question bearing No. 5—"Did the District Court give full scope to its responsibilities with respect to judicial review?"—can be readily answered, emphatically and unequivocally, in the affirmative, and is clearly not a substantial question.

Appellants' thrust here is at the lower court's Conclusion of Law No. 6 reading:

> "An order of the Interstate Commerce Commission is entitled to great respect, representing as it does the opinion of a body of experts upon matters within the range of their special knowledge and experience. . . ." (p. 11, typewritten copy of decision; p. 10a of Appendix A to Appellants' Jurisdictional Statement)

Numerous decisions of this Court were cited by the Court to support this proposition, and they firmly support it.

Of these cases appellants refer only to *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474 (1951), evidently because they relied on that decision in the court below, mistakenly, as authority for the erroneous proposition that the Commission is "not nearly so expert as the federal judiciary on many of the issues in controversy"[3] or, as more fully stated orally by counsel for the City of Nashville:

> ". . . when you find these statements about the expertise of the Commission, they have to be confined to technical questions. Certainly the

[3]From p. 2 of appellants' brief in the court below.

> Interstate Commerce Commission has an expertise on technical rate-making matters, but on questions of the kind involved here, there is no expertise in the Commission that this Court doesn't have, . . ." (R. 49)

the point being, of course, that appellants wanted the court to substitute its judgment for that of the Commission, so long as such matters as rate-making were not involved. On such questions as are presented in a railroad merger case appellants would have it believed (p. 39) that the decision in the *Universal Camera Corp.* case "enlarged the scope of judicial review." Yet the fact is that in that decision this Court expressly referred to an administrative agency such as the Commission as—

> ". . . one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. . . ." (340 U. S. at p. 488)

and said further:

> ". . . Nor does it [Administrative Procedure Act] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress [by that Act] has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is

substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." (340 U. S. at p. 488)

Dealing specifically with the Commission's functions in a merger case, this Court has clearly stated, in the *McLean Trucking Co.* case, as has earlier herein been shown:

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' . . ." (321 U. S. at pp. 87-88)

But appellants say (p. 39) in this case "the errors of law relied upon do not relate to matters of discretion within the special knowledge and experience of the Commission." Yet the Complaint in this case was a

veritable broadside at the Commission's decision, it being assailed not only because of alleged misinterpretation of the law and alleged procedural errors but also because the Commission found, erroneously it was charged, that the reduction in competition resulting from the merger would be consistent with the public interest; because of findings by the Commission that the merger would be productive of more efficient operation, of large savings, of a strengthening of the involved properties and enhancement of the adequacy of the service they provide and the best use of the facilities of the involved railroads, and that the advantages to the public in general outweigh the disadvantage to the single locality of Nashville (Complaint, par. 6, 8-12); because the Commission, it was alleged, committed error in not following a precedent (Complaint, par. 13); because, it was alleged, the Commission had accorded too much weight to the number and character of witnesses who supported the merger (Complaint, par. 15); and because, it was alleged, the Commission concluded "that the transactions will be consistent with the public interest" (Complaint, par. 16), as well as on various other grounds.

Here, it may well be said, as was said in *O. C. Wiley & Sons* v. *United States,* 85 F. Supp. 542, 544-545 (1949), affirmed 338 U. S. 902 (1949), a case involving action by the Commission under Section 5(2) of the Interstate Commerce Act:

> "The primary concern of the Commission here is the protection of the public interest. It has been repeatedly held that a very strong showing must

be made (and here there is no such showing) by one who seeks to set aside an order of the Commission in this field. [Citing cases]"

Finally, appellants assert, in dealing with this question, that "the Court did not say that, in making its determinations, it had reviewed the whole record, or such portions thereof as had been cited by counsel" (p. 39). Apparently appellants have not read the decision carefully, for the following statement, quoted earlier herein, appears at the very outset of it:

". . . The court has considered the pleadings and the proceedings and evidence adduced before the Interstate Commerce Commission, the entire record in the case, and the oral arguments and briefs of the attorneys for the plaintiff, for the defendants, and for all the interveners, constituting all the parties. . . ." (p. 1, typewritten copy of decision; p. 1a, Appendix A, Appellants' Jurisdictional Statement).

Questions 6 and 7 Present No Substantial Question.

Almost immediately after saying "the errors of law relied upon do not relate to matters of discretion within the special knowledge and experience of the Commission" (p. 39), appellants raise questions (Nos. 6 and 7 combined) as to whether the Commission committed "prejudicial errors . . . in evaluating the evidence" (p. 39).

Whereupon, appellants launch into a discussion of such matters as service improvements, best use of facilities, savings, efficiency, strengthening of the involved

properties, the extensive support from the shipping public for the merger and the lack of opposition from other railroads. These were matters which were the subject of elaborate proof, and argument, before the Commission.[4] Contrary to the contention of appellants, appellee showed that distinct improvements in service[5] would result from the merger, and the Commission expressly found that large savings would be accomplished and that it would result in greater efficiency, the best use of the facilities and the strengthening of the properties.[6]

The Commission also found:

> "Considerable evidence in support of the application was submitted by representatives of freight bureaus, manufacturing and traffic associations, chambers of commerce, and individual shippers throughout the entire territory served by the Kentucky and Tennessee companies, including the city of Nashville. . . ." (295 I. C. C. at p. 479)

following which the Commission epitomized the nature of such evidence (pp. 479-480). The Commission's report reveals not only no opposition from other railroads but support from two of them (pp. 480-481).

While the Commission's report and the record stand squarely against the arguments here advanced by the appellants, there can be no occasion to go into these sub-

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[4]As may be seen in our brief (pp. 7-91, 134-137) and our reply to exceptions (pp. 4-41, 80-85, 221-223), which were appended to the answer of the appellee.

[5]Please see *supra*, pp. 18-21.

[6]295 I. C. C. at pp. 491-493, 504.

jects fully here, for it is well established the Court will not reweigh the evidence and resolve such questions. Thus this Court plainly said in *United States* v. *Pan American Corp.*, 304 U. S. 156, 158 (1938):

> ". . . The value and weight of the evidence given by railroad and plant executives, and the inferences to be drawn from it, were for the Commission. . . ."

In *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547 (1912), this Court said:

> ". . . the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. . . ."

Please see also *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470 (1910); *Virginian Ry.* v. *United States*, 272 U. S. 658, 666 (1926); *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 536 (1946); and *Baltimore Transfer Co.* v. *Interstate Commerce Commission*, 114 F. Supp. 558, 563-564 (1953), affirmed 346 U. S. 890 (1953).

The Court may very fittingly say here, we respectfully submit, as Mr. Justice Cardozo said, speaking for the Court, in *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286-287 (1934):

> ". . . The judicial function is exhausted when there is found to be a rational basis for the

conclusions approved by the administrative body. In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader, upon the face of its report. . . ."

Question 8 Presents No Substantial Question.

Question 8 raises the question whether the Commission's report meets the requirements of the Administrative Procedure Act, specifically Section 1007 of 5 U.S.C.[7] The principal allegations of the Complaint on this subject were:

". . . that the report consists in the main of a running discourse reciting the contentions and statements of the parties, with no showing as to how the ultimate conclusions are related to such findings as are expressly or impliedly made. It is quite impossible to determine from the report which statements are findings and which are a mere recitation of contentions of the parties. The findings are not definite and clear and are not accompanied by clear statements of the reasons or basis therefor. . . ." (Complaint, pp. 17-18)

The Complaint proceeded to charge that the proposed report of the Examiner was of the same character and that an exception filed by the City of Nashville to his report on the same ground was not sustained (Complaint, p. 18).

If the criticism of the Commission's report were valid, and it is not, appellants should not be heard to

[7] 60 Stat. 237 (1946).

utter it, in view of the fact that they neglected altogether in their briefs to observe the requirement of the Commission, in its General Rules of Practice, that "[e]ach brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make,"[8] and again neglected, in their exceptions, to submit any proposed statements for substitution for those contained in the Examiner's report, as contemplated by the Commission's rules, such rules providing that when exceptions are taken to an Examiner's proposed report "a corrected statement *must be* incorporated"[9] (Italics ours) .

The Commission's report recites in great detail the important facts of the case and the contentions of the parties, together with preliminary findings of fact, and thereafter presents, at pages 502-506 (295 I. C. C. 457), its ultimate findings and conclusions. Those findings and conclusions are specific and clear, and there should be no difficulty on the part of anyone in understanding them or the reasons therefor.

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[8] 49 CFR §1.91(e). The rule in its entirety reads:

"*Requested findings.* Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make."

[9] 49 CFR §1.96(a). The rule in its entirety reads:

"*Exceptions to officer's report*—(a) *Generally.* Exceptions to the officer's report with respect to statements of fact or matters of law must be specific and must be stated and numbered separately. If exception is taken to conclusions in the report, the points relied upon to support the exception must be stated and numbered separately. When exception is taken to a statement of fact contained in the report, reference also must be made to the page or part of the record relied upon to support the exception and a corrected statement must be incorporated."

Howbeit, it may be doubted that the Commission is required to make detailed findings as appellants seem to suppose. In *Alabama G.S. R. Co.* v. *United States*, 340 U. S. 216, 227-228 (1951), this Court said:

> "As to the contention of appellants that the Commission's order is not supported by essential findings of fact, §14(1) of the Interstate Commerce Act, 49 U.S.C. §14(1), does not require the Commission to make detailed findings of fact except in a case where damages are awarded. *Manufacturers R. Co.* v. *United States*, 246 U. S. 457, 487, 489-490. The statute requires the Commission only to file a written report, stating its conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment is sufficiently disclosed in its report. Of course §14(1) does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order. [Citing cases] And the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented. [Citing cases] Here the Commission found, in conformity to the statute invoked, *supra* note 2, that the differentials prescribed are 'justified as reasonable' and 'necessary and desirable in the public interest.' And 'the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data . . . .' *United States* v. *Louisiana*, 290 U. S. 70, 80. Enough has been 'put of record to enable us to perform the limited task which is ours.' *Eastern-Central Assn.* v. *United States*, 321 U. S. 194, 212."

Dealing particularly with the basic requirements in a case such as this one, under Section 5(2) of the Interstate Commerce Act, the three judge court (E.D., La.) in *Herrin Transp. Co.* v. *United States,* 108 F. Supp. 89, 94 (1952), said:

> "In this case, the Commission was required by the Statute to make two basic findings: (1) that the proposed transaction is within the scope of Section 5(2)(a) of the Statute, and (2) that the proposed transaction would or would not be consistent with the public interest. These findings were made by the Commission. . . ."

The Commission made such findings, very explicitly, in this case, at pages 505-506 of its report (295 I. C. C. 457).

A contention such as that advanced here was advanced in *Baltimore Transfer Co.* v. *Interstate Commerce Commission, supra.* The Court there said:

> "Plaintiffs make the sweeping contention that the Commission's order of April 25, 1952, is 'inconclusive of the issues, arbitrary, capricious, discriminatory, premature, contrary to provisions of law and the evidence, and unsupported by the evidence.' But we find this contention to be wholly without merit. The Commission was required to make only two basic findings: (1) whether the proposed purchases by Quinn from Neale and Wadkins of their operating rights were within the scope of Section 5(2) (a) of the Act; and (2) whether these transactions would be consistent with the public interest. *Alabama Great Southern Ry. Co.* v. *United States,* 340 U. S. 216, 71 S. Ct.

> 264, 95 L. Ed. 225. We find that the Commission did make affirmative findings on both of these points, although the first is not in issue, since we do not understand that the plaintiffs question the Commission's authority under Section 5 to authorize transactions of this character. . . ." (114 F. Supp. 558, 564)

But, as we have indicated, and as anyone may see upon a careful reading of the elaborate report in this case, the Commission has gone far beyond what is required in its recitation of the evidence and the contentions of the parties and in setting forth the most lucid findings and conclusions.

Appellants say (p. 44) "it is difficult to ascertain just which contentions of the applicants are actually accepted, and why." A single illustration should suffice to show how baseless this charge is.

One of the contentions of appellee, as showing the need for the merger, was that the growth of competition by other modes of transportation has been materially aided by tremendous government expenditures which have been steadily and substantially increasing. The Commission recited[1] the undisputed facts relating to such government expenditures and thereafter said, as we have hereinbefore shown:

> "The foregoing reflects how imperative it is for the railroads to do everything in their power to enhance their competitive situation through all possible economies and efficient operations. The proposed merger is designed to accomplish that result." (p. 468)

[1] 295 I. C. C. at pp. 467-468.

Appellants say (p. 44): "The ultimate findings or conclusions, in the language of the statute, are not based on subsidiary findings that can be easily identified, and for which 'the reasons or basis' are stated, . . ." Another illustration should suffice to show the complete lack of foundation in this charge.

A matter of major importance in the case was the economies which might be realized from the merger. The evidence was reviewed at pages 488-493 of the Commission's report (295 I. C. C. 457), near the conclusion of which the following statement was made:

> ". . . This amount added to the foregoing similar savings to be effected in the traffic and operating departments, mentioned heretofore, produces estimated annual reduction in cost of all departments resulting from the merger of $3,243,123." (pp. 491-492)

The Commission proceeded thereafter with a further discussion of the subject and concluded with this finding:

> ". . . It is apparent from the record that the combined properties will be operated more efficiently than they are now under separate managements, and that the savings to be realized from the unified operations will approximate those estimated by applicants." (p. 493)

Included in its ultimate conclusions was the following:

". . . Applicants . . . identify aggregate savings of more than $3 million per year, with other possible savings[2] . . ." (p. 504)

Is there any trouble connecting or relating this ultimate conclusion to earlier and preliminary or subsidiary findings? Is there any difficulty understanding the reasons and basis for the conclusion on this phase of the case?

Patently based on the economies detailed in those portions of the report we have cited, considered together with its findings as to competition, particularly with other modes of transportation, and rising costs,[3] the ultimate conclusions contained also the following:

". . . The elimination of the Tennessee Company as a separate entity will avoid many duplications of accounting, reporting, etc., between carriers and to regulatory authorities, and the corporate components of the surviving company will be simplified, all in the public interest.

"Combining the facilities and resources of the Kentucky Company and the Tennessee Company under one management would give better control of mounting operating costs and enable the surviving company to meet more effectively competition from other modes of transportation. The anticipated accomplishments from the merger would give assurance of a stronger and financially more stable railroad.

"Single ownership and control of the properties will tend toward a more economical and ef-

[2]As to such "other possible savings" please see the preliminary findings on this subject at pp. 492-493.

[3]295 I. C. C. at p. 479.

> ficient operation which, in turn, will inure to the benefit of the shipping public. Compare *Bessemer & L.E. R. Co. Merger,* 275 I. C. C. 167, 179. It will also, in this case, result in desirable corporate simplification, will reduce accounting work with its attendant expenses, and will materially reduce the number of reports which must now be filed individually by the applicants with regulatory commissions and other public authorities." (295 I. C. C. at pp. 504-505)

Are not these findings and conclusions clear and certain, enabling anyone to understand the reasons and basis for the action of the Commission on material issues of fact before it? Do not they put completely at rest the contention that the report is largely a running discourse of contentions without any indication of how the conclusions were reached?

Appellants say (p. 44) that "[i]n the main the [Commission's] report is merely a verbatim report of the proposed report of the Examiner," with the addition of the brief statement which is quoted. A detailed comparison of the two reports will reveal many differences in them, but aside from that it should be pointed out that the Examiner prepared a very comprehensive and painstaking report to which the appellants filed very brief exceptions. We invite a comparison of the Examiner's report with appellants' exceptions, both of which are in the record certified to this Court.

Appellants next assert (p. 44) that it is impossible to determine from the report just how, where and in

what respects the merger "would enhance adequacy of service by the merged companies, and would constitute the best use of the facilities," as found by the Commission.

These conclusions follow logically from the whole report and numerous subsidiary findings, some of which have been referred to herein.[4] Others may readily be cited, *e.g.*:

> ". . . The gist of such testimony [by shippers] was to the effect that the merger would benefit the public by providing single-line service, without interchange, to many points not now available . . ." (295 I. C. C. at p. 479)
>
> . . . . . .
>
> ". . . If the merger is consummated, all the routes now available to shippers over the separate lines will be available via the surviving company on single-line hauls." (p. 486)

And:

> ". . . The merger also will result in efficiency by the surviving company's enjoying longer hauls on substantial volumes of traffic, and substantial increased revenues because of the great concentration of this traffic via the relatively shorter and more economical routes." (p. 477)

It is thus clearly seen that the basis for the report's conclusion is not "foggy" as charged by the appellants (p. 44), but on the other hand that appellants manifestly present here no substantial question.

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[4] *Supra*, pp. 13-14, 18-21, 30.

In *Capital Transit Co.* v. *United States*, 97 F. Supp. 614, 621 (1951), a three-judge court (D., D.C.) said, in circumstances similar to those present here:

> "The Commission here made its ultimate findings in the terms of the Motor Carrier[s] Act, which authorizes issuance of a certificate of convenience and necessity when it is found 'that the applicant is fit, willing, and able properly to perform the service proposed and to conform to * * *' the requirements of law 'and that the proposed service * * * is or will be required by the present or future public convenience and necessity * * *.' In addition, Division 5 of the Commission filed a lengthy opinion setting out the facts in detail and the considerations which it deemed applicable in reaching its conclusion. Certainly more than 'Enough has been "put of record to enable us to perform the limited task which is ours"' *Alabama Great Southern R. R. Co., et al.* v. *United States*, 340 U. S. 216, 71 S. Ct. 264, 272. And the Administrative Procedure Act does not require detailed findings of every subsidiary evidentiary fact. So long as the agency makes amply clear the factual basis upon which it has proceeded, there can be no ground for complaint. . . ."

In *Baltimore & O. R. Co.* v. *United States*, 201 F. 2d 795, 798 (1953), the Court (3. Cir.) said, dealing with the requirement of the Administrative Procedure Act here referred to:

"A similar requirement is found in Federal Rules of Civil Procedure No. 52(a),[5] 28 U.S.C., which requires of the trial judge in a case tried to the court to 'find the facts specially and state separately its conclusions of law thereon * * *.'

"This court and others have held that if the trial judge makes his findings and they are sufficiently clear to see what he has found, it is not reversible error if he does not list them in a 1-, 2-, 3-, 4- order, although it is exceedingly convenient when they are so spelled out and numbered. The same latitude should be allowed a commission or board, although it may be remarked in passing that it is always helpful to a court called upon to review agency action to have the fact-findings of such agency clearly and categorically stated."

Here the agency has clearly and categorically stated its findings and conclusions and gone far beyond the "bare bones" requirement which the Court there held specifically meets the requirements of the statute.

Question 9 Presents No Substantial Question.

Appellants merely say that this question—"Was the conclusion 'that the transaction will be consistent with the public interest' supported by the record?"—

[5]Concerning which this Court has said in *Timken Co.* v. *United States*, 341 U. S. 593, 597 (1951), as might well be said of the Commission's hearings and report in this case:

". . . . In the present case, the trial judge after a patient hearing carefully analyzed the evidence in an opinion prepared with obvious care. Appellant's lengthy brief has failed to establish that there was error in making any crucial, or even important, ultimate or subsidiary finding. Since we cannot say the findings are 'clearly erroneous.' we accept them. Fed. Rules Civ. Proc., 52(a)."

should be answered in the negative for reasons they have given earlier.

The reasons we have hereinbefore[6] set forth show not only that the question cannot be so answered but that the question itself is devoid of any substantial character.

As we have shown, this Court, in the *McLean Trucking Co.* case, has definitively held; referring to action by the Interstate Commerce Commission in a merger case:

> ". . . 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' . . ." (321 U. S., pp. 87-88)

Question 10 Was Not Raised Below and in Any Event Is Not a Substantial Question.

Question 10 is stated (p. 45) as:

> "Is it a matter of national concern (assuming that the order is otherwise valid) whether the two railroads 'consolidate' under state law or 'merge' under nonexistent law; and if so, is that issue justiciable in this cause?"

The two questions thus presented were not presented below, and therefore cannot properly be considered here. Furthermore, the assumption indulged in the question that there is a Tennessee law covering consolidations but that railroad mergers are not

[6] *Supra*, pp. 11-21, 30, 41-44, 65, 73-75.

covered by any Tennessee law is, in our view, an erroneous one, as will hereinafter be indicated.

A somewhat similar question was raised by paragraph 17 of the Complaint. It was that "if the order of the Commission dated March 1, 1957, be construed as granting the applicants authority, without authorization by Tennessee law, to merge the Tennessee Company into the Kentucky Company, said order is to that extent void and of no effect"; that the charter of the N.C.& St.L. contains no provision authorizing it "to extinguish or abandon its corporate existence and franchises by merger into a corporation of another state"; and "that there is no general law in Tennessee which authorizes a railroad corporation incorporated by special act to extinguish or abandon its corporate existence and franchises in this manner" (Complaint, pp. 19-20).

An adequate answer to any such question is to be found in the concluding words of Section 5(11)[7] of the Interstate Commerce Act, reading:

> ". . . any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

Appellants charged, further, that if Section 5 of the Interstate Commerce Act "be construed as attempting to confer upon the Commission the power and authority to supply such statutory authority, where

[7] 54 Stat. 908 (1940); 49 U.S.C. § 5(11).

not supplied by state law, then Section 5 of the Interstate Commerce Act, as so construed, violates the Tenth Amendment to the Federal Constitution and is unconstitutional and void" (Complaint, p. 20).

By Conclusion of Law No. 2, the court held that Section 5(2) is constitutional, citing *United States* v. *Lowden,* 308 U. S. 225 (1939), which is squarely in point, and by Conclusion of Law No. 3 it held that under Section 5(2)[8] of the Interstate Commerce Act the Interstate Commerce Commission "is empowered to authorize the merger of two or more railroads without regard to the provisions of law of any State, except that State law, if any, may govern the size of the stockholder vote required for approval of a merger" (p. 10, typewritten copy of decision; pp. 9a-10a, Appendix A, Appellants' Jurisdictional Statement).

There can be no doubt of the correctness of the lower court's decision on these points and no doubt of the utter unsubstantiality of any contention that there is room for the operation of state law, except only as specified by the court below, in cases of this kind. Such questions are settled by *Texas* v. *United States,* 292 U. S. 522, 528-529 (1934); *Seaboard Air Line Railroad Co.* v. *Daniel,* 333 U. S. 118, 124-127 (1948); and *Schwabacher* v. *United States,* 334 U. S. 182, 191-199 (1948). Please see also the Commission's clear statement on the subject at 295 I. C. C. 457, 459.

[8]Which should be read with Section 5(11). These two paragraphs—2 and 11 of Section 5 of the Interstate Commerce Act—are reproduced in Appendix C hereto (24 Stat. 380 (1887), as amended; 49 U.S.C. § 5).

The decision of this Court in *United States* v. *Lowden* cited by the lower court is a direct and positive ruling that Section 5(2) (then Section 5 (4)) is constitutional.

Appellants say (p. 49) they believe *Hopkins Savings Association* v. *Cleary*, 296 U. S. 315 (1935), is directly in point on the question whether or not Section 5(11) of the Interstate Commerce Act violates the Tenth Amendment, that case having been concerned with an enactment of Congress which attempted to authorize the conversion of state building and loan associations into Federal institutions without the consent of the state. But this Court was careful to point out (296 U. S., at p. 338), "We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the commerce clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount." Section 5(11) of the Interstate Commerce Act specifically makes the authority of the Commission over rail mergers "exclusive and plenary", and in *Schwabacher* v. *United States*, 334 U. S. 182, 198, this Court held that this provision "argues with equal force that federal law is also plenary and exclusive." This Court further said (p. 198): "We think it is equally clear that the Commission must look for standards in passing on a voluntary merger only to the Interstate Commerce Act. In matters within its scope it is the supreme law of the land."

Appellants say (p. 49) that here, there is presented an issue not with respect to positive provisions of the law of Tennessee but with respect to the absence of any provision of law authorizing a merger. The answer to this is, first, that there is a Tennessee statute sufficiently broad to cover mergers of railroads;[9] second, that the issue as stated by appellants is raised too late, not having been raised below; and, third, that in any event it is a distinction without a difference.

Question 11 Presents No Substantial Question.

Question 11 is stated by appellants as being whether they had standing to attack the Commission's order in this case on the ground that the Mercantile-Safe Deposit & Trust Company of Baltimore was not a party to the application and the Commission did not

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[9]A certified copy of it—Section 2610 of Williams Tennessee Code (now Section 65-601 of Tennessee Code Annotated)—appears in the record as Exhibit H-58 (Tr. 1370-1, 1644). It reads:

"*All railroad companies of this state, and any other state or states, are empowered to* build, lease or let, *acquire* by purchase, lease *or otherwise*, and operate, hold, or dispose of any railroad or railroads in any state or states, or any parts or portions of any such railroad or railroads, and the distribution thereof, as may be determined upon by their stockholders, and to acquire by purchase or otherwise, and hold or dispose of any bonds or shares of the capital stock of any railroad company or companies in any state or states, and to indorse and guarantee the bonds of any railroad company or companies in any state or states, whose original charter of incorporation was granted by the State of Tennessee; provided, that the same be approved by the vote of three-fourths in amount of the capital stock of said company present and voting, either in person or by written proxy, at a regular or called meeting of the stockholders of said company; and provided further, that ten days' notice be given in a Memphis, Knoxville, and Nashville daily newspaper, of the time, place, and purpose of the meeting." (Italics ours.)

find as to it that acquisition of control of the N.C.& St.L. would be in the public interest.

This is not a question of any substance whatever.

At page 13 of the merger application, which bears date of January 26, 1955, it was shown that the Mercantile-Safe Deposit & Trust Company is the principal stockholder, and that Safe & Company (affiliated with such Trust Company) is the second largest stockholder, of The Atlantic Coast Line Company. The Atlantic Coast Line Company was made a party to the application. The question whether Mercantile-Safe Deposit & Trust Company itself was a necessary party to the proceedings before the Commission was raised by the appellants for the first time in the District Court, their Complaint having been filed March 29, 1957.

The facts are set forth in the court's Finding of Fact No. 3 (p. 3, typewritten copy of decision; p. 3a, Appendix A, Appellants' Jurisdictional Statement) and need not be repeated here. The court below held:

> "9. The plaintiff and the intervening plaintiffs complain of the failure of the railroads, in the proceeding before the Commission, to join as an applicant the Mercantile-Safe Deposit & Trust Company, shown by the application to be the principal stockholder of The Atlantic Coast Line Company. Neither the plaintiff nor any intervening plaintiff has shown wherein such failure adversely affects any of its legal interests. The Court holds that the failure to join the Mercantile-Safe Deposit & Trust Company was not a jurisdictional defect and does not affect the validity of

the Commission's order herein; and that such failure, not being a jurisdictional defect and not having been raised in the proceeding before the Commission, cannot be raised now for the first time before this court.

"In *Alleghany Corp.* v. *Breswick & Co.*, —— U. S. ——, decided April 22, 1957, it was held that 'the failure to join two stockholders alleged to control Alleghany does not oust the Commission of jurisdiction.'

"In *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37, the Supreme Court said: 'Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice'." (pp. 12-13, typewritten copy of decision; p. 12a, Appendix A, Appellants' Jurisdictional Statement).

These conclusions of law are unquestionably correct. The parallel between the question presented to the lower court and that presented to this Court in *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957), is a very direct one. There the Court said:

"Appellees also urge that the *Marshall Transport* case, 322 U. S. 31, requires dismissal of Alleghany's application because two stockholders, alleged to dominate Alleghany, did not join in the application and therefore in the absence of those two indispensable parties, the Commission had no jurisdiction to proceed. But in the *Marshall*

Transport case, the Commission was refusing to approve a subsidiary's application to acquire control of the property and operating rights of another carrier unless the non-carrier parent submitted itself to the Commission's jurisdiction, and the Court upheld the Commission's power to refuse to approve the application.

"Although the Court in that case used language of 'jurisdiction,' the problem is not strictly jurisdictional . . . The failure to join two stockholders alleged to control Alleghany does not oust the Commission of jurisdiction. Since that is so, the status order submitting Alleghany to the Commission's jurisdiction cannot be attacked on that basis." (353 U. S. 151, at pp. 171-172)

Even if Mercantile-Safe Deposit & Trust Company controlled The Atlantic Coast Line Company (which we do not admit), the remedy would not be invalidation of the Commission's order in a case of this kind but, as the opinion in the cited case makes clear, a proceeding under Section 5(7), (8) and (9)[1] of the Interstate Commerce Act (353 U. S. at p. 162).

United States v. *Tucker Truck Lines,* 344 U. S. 33 (1952), cited by the lower court, is squarely in point on the proposition that the question was not timely raised by the appellants. To the same effect is *Unemployment Comm'n* v. *Aragon,* 329 U. S. 143, 155 (1946).

This Court's decision in the *Alleghany* case shows clearly the correctness of the lower court's ruling that appellants have not shown that failure to join Mercantile-Safe Deposit & Trust Company as a party ap-

[1] 54 Stat. 908 (1940); 49 U.S.C. 5(7), (8) and (9).

plicant adversely affects any of their legal interests. The test was thus stated in 353 U. S. at p. 160, footnote 5:

> ". . . has the action of the administrative agency threatened the interests of the complainant, whether corporation or, as here, stockholder otherwise qualified to sue, sufficiently to allow attack? (This does not mean of course that the same agency action that allows attack by one allows attack by the other.)"

Again, at page 173, the Court pertinently said:

> "The reference in §5 to 'interested parties,' like the reference in §1(20) to 'party in interest,' must be interpreted in accordance with the rules relevant to standing to become parties in proceedings under the Interstate Commerce Act. A hearing under that Act is not like a legislative hearing and 'interest' is not equivalent to 'concern.' It may not always be easy to apply in particular cases the usual formulation of the general principle governing such standing—*e. g.*, 'the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order.' *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 119. In each case, the sufficiency of the 'interest' in these situations must be determined with reference to the particular context in which the party seeks to assert its position."

It is clear that the appellants cannot show any legal interest in the question, their interest, if any, being at the level of the merger of the N.C.& St.L. into the L.& N.

Question 12 Presents No Substantial Question.

The final question raised by appellants (p. 52), whether there should be a reversal of the lower court's decision because thirty days did not elapse from the date of service of the Commission's initial order until its effective date, is thoroughly technical and an altogether unsubstantial one.

In paragraph 19 of its Complaint the City of Nashville alleged that the order of the Commission dated March 1, 1957, is void because the order, though dated March 1, 1957, was not released until March 13, 1957. The City cited Section 15(2) of Title 49, U. S. Code, which provides that certain orders of the Commission shall take effect "within such reasonable time, not less than thirty days . . . according as shall be prescribed in the order." The City recited in its Complaint (p. 21) that the order of the Commission provided, in the last paragraph thereof, that such order "shall become effective 40 days from its date."

Appellants interpret the language last quoted to mean a day certain, April 9, 1957.[2] The latter date is only twenty-seven days after March 13, the date of release, and, therefore, three days less than the mini-

[2]A permissible interpretation would be that the Commission intended, if such be necessary to the validity of the order, that the order become effective thirty days after *service* of the order. Please compare *Donner Steel Co.* v. *D., L. & W. R. R. Co.*, 92 I. C. C. 595, 597 (1924), where the case was decided June 7, the report served June 29, and a corrected reprint served July 15. The Commission held that a petition for rehearing, required to be filed within sixty days, was timely filed August 30, such date being only "45 days after the *service* of the corrected reprint." (Italics ours.)

mum period set by Section 15(2)[3] if such period be computed from the date of release.

By its order dated April 3, 1957, a copy of which was filed as Exhibit A to the answer of the defendant railroads to the Complaint of the employee group herein, the Commission ordered "that the effective date of the order be postponed from April 9, 1957, to April 12, 1957." Thus, if there had been any merit to the City's contention that the Commission's order of March 1 was erroneous because its effective date was twenty-seven rather than thirty days after the date of release of the order, this three-day extension of the effective date would have corrected the error.[4]

Furthermore, the Commission, on April 12, 1957, issued an additional order[5] in this proceeding by which the effective date of the Commission's order of March 1, 1957, was "postponed until further order of the Commission." The order of April 12 recited the fact that on April 2 the District Court had issued its order staying and suspending the Commission's order pending hearing and decision by a three-judge court." Thus, if there was any infirmity in the Commission's

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[3]24 Stat. 384 (1887), as amended.

[4]Please compare *State of Florida* v. *United States*, 31 F. 2d 580 (1929), where the three-judge District Court for the Northern District of Georgia said:

> ". . . This clarifying order is not to be esteemed a new order, or even an amendment extending the former one, but is only a clarification of that which was found before to be uncertain, and, though made without further hearing, or evidence, is none the less effective from its date, at least. . . ." (p. 581)

[5]A copy of the April 12 order was attached as Exhibit No. 1 to the appellee's Answer to the amendments to Complaint filed herein by the City and the intervening plaintiffs.

order of March 1, it was rendered innocuous by the indefinite postponement of the order's effective date.

Finally, after Judge Martin's restraining order had been dissolved by the three-judge court, the Commission, on July 10, 1957, issued a further order, the concluding paragraph of which reads:

> "*And it is further ordered,* That the report and order dated March 1, 1957, shall become effective 30 days from the date of service of this order."

The service date of the order was July 15, 1957, so that the Commission's order became effective August 14, 1957.

We furthermore direct the Court's attention to the fact that it has held that the thirty-day requirement of Section 15(2) applies only to orders entered under Section 15(1) of the Interstate Commerce Act, and to the fact that the order in the case at bar was not entered under Section 15(1) but under Section 5(2). *United States* v. *American Ry. Express,* 265 U. S. 425, 430, note 3 (1924).

For these reasons it is abundantly clear that appellants' final question presents nothing substantial.

Conclusion.

In their statement under the heading "Jurisdiction," at pages 2-4, appellants suggest that this Court may not have jurisdiction of the appeal because the court below was not properly constituted. The statute involved, Section 2284(1),[6] as is stated in footnote 2 on

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[6] 62 Stat. 968 (1948); 28 U.S.C. §2284(1).

page 4, requires "the chief judge of the circuit" to designate "two other judges, at least one of whom shall be a circuit judge." The statute contemplates that the third member of the Court shall be the District Judge before whom the action was brought. In this case the District Judge had become incapacitated, before any hearing in this cause, due to a heart attack. The designation order, executed April 9, 1957, by the chief judge of the Sixth Circuit, reads in pertinent part:

> ". . . I hereby designate the judges to constitute such court as follows: The Honorable John D. Martin, Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable Leslie R. Darr, United States District Judge for the Eastern District of Tennessee, and the Honorable Roy M. Shelbourne, United States District Judge for the Western District of Kentucky. The said hearing to begin on Tuesday, May 7th, and continue through May 8th and for such further time as is necessary to complete it and to make final determination therein."

The clear intent of the statute is that the court should be so constituted, and in the circumstances present here it could only be held, we submit, that the court was properly constituted.

There is obviously, then, no more to this suggestion of appellants than there is to the variety of questions listed for the Court's consideration, all such questions being, as we have been at pains to show, thoroughly devoid of substance.

Such being the case, it is respectfully submitted the judgment and decree of the court below should be affirmed, and, accordingly, we ask that the motion submitted at the outset hereof be granted.

Respectfully submitted,

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Attorneys for Appellee Louisville and Nashville Railroad Company.

PROOF OF SERVICE.

I, W. L. Grubbs, one of the attorneys for appellee Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Motion to Affirm and Brief in support thereof on appellants by mailing copies thereof, in duly-addressed envelopes, with first-class postage prepaid (except that in the case of the addressees located in Washington, D. C., air-mail postage prepaid has been employed), to their attorneys of record, as follows:

Mr. William Waller,
Waller, Davis & Lansden,
American Trust Building,
Nashville 3, Tennessee.

Messrs. La Roe, Winn & Moerman,
Investment Building,
Washington 5, D. C.

Messrs. Walter Harwood and Judson Harwood,
Nashville Trust Building,
Nashville 3, Tennessee.

Hon. George F. McCanless, Attorney General,
State of Tennessee,
State Supreme Court Building,
Nashville 3, Tennessee.

Hon. Henry C. Foutch, Asst. Attorney General,
State of Tennessee,
State Supreme Court Building,
Nashville 3, Tennessee.

Hon. Allison B. Humphreys, Solicitor General,
State of Tennessee,
State Supreme Court Building,
Nashville 3, Tennessee.

Hon. Harold Seligman, General Counsel,
Tennessee Public Service Commission,
Nashville 3, Tennessee.

Hon. Elmer D. Davies, Jr., County Attorney,
County of Davidson,
Nashville 3, Tennessee.

This 6th day of September, 1957.

W. L. GRUBBS,

ILLINOIS
MO.
ARK.
TENNESSEE
KENTUCKY
ALABAMA
NORTH CA
WEST VIRGIN
ST. LOUIS
EAST ST. LOUIS
MC LEANSBORO
MT. VERNON
CRAWF
LOUISVILLE
EVANSVILLE
CINCINNATI
NEWPORT
LATONIA
MAYSVILLE
CHARLESTON
KANAWHA
OHIO
RIVER
CHRISTIANSBURG
PARIS
FRANKFORT
LEXINGTON
WINCHESTER
SPRINGFIELD
HAZARD
DEANE
FLEMING
OWENSBORO
ELIZABETHTOWN
HARTFORD
HENDERSON
CLAY
ATKINSON
SHAWNEETOWN
LEBANON
CAVE CITY
GREENSBURG
CORBIN
PINEVILLE
HARLAN
LYNCH
NORTON
CLINCHFIELD
ST PAUL
GLASGOW
BOWLING GREEN
ELKTON
RUSSELLVILLE
SCOTTSVILLE
JELLICO
MIDDLESBORO
DOSSETT
OAK RIDGE
KNOXVILLE
WINDROCK
HARTSVILLE
GALLATIN
NASHVILLE
SPARTA
HARRIMAN
PIKEVILLE
MARYVILLE
JENA
TELLICO PLAINS
MURPHY
BLUE RIDGE
SOU. R. R.
SPARTANBURG
CHATTANOOGA
ATHENS
ETOWAH
TULLAHOMA
PALMER
LEWISBURG
COLUMBIA
HOHENWALD
JACKSON
MILAN
MC KENZIE
PARIS
BRUCETON
MT. BOLDT
MEMPHIS
FLORENCE
SHEFFIELD
DECATUR
HUNTSVILLE
GUNTERSVILLE
HOBBS ISLAND
Ferry
LEHIGH
WARRIOR
TUSCALOOSA
PRACO
BIRMINGHAM
ANNISTON
CALERA
SYLACAUGA
GADSDEN
CARTERSVILLE
MARIETTA
ATLANTA
GA. R.R.
AUGUSTA
C. B
A & W. PT.
WINSTON-

APPENDIX B.

Examples of Requests on Applicants, by Those Opposing Application, for Data Beyond That Required in the Special Rules of Practice Relating to Applications Under Sec. 5(2) and Sec. 20a.

1. June 10, 1955

Counsel Requesting:
MR. LaROE

Requested by letter dated June 10, 1955:

(a) Written agreements between the applicants with respect to the solicitation and routing of freight, together with routing circulars and amendments implementing such agreements; also any correspondence on that subject in the past ten years.

(b) Correspondence between the applicants with reference to the advantages and disadvantages of the proposed merger, including studies showing estimated savings and costs in traffic, improvements in service to the public, etc.

(c) The most recent audit reports of the applicants.

(d) Correspondence between N.C.& St.L. and other railroads in the past ten years in regard to routings and proposed routings which would compete with L.& N. routes or with routes in which the L.& N. participates.

The audit reports and the routing circular with amendments thereto and certain correspondence pertaining thereto were supplied.

2. July 11, 1955 — **Counsel Requesting: MR. BOLES**

Requested by letter dated July 11, 1955:

(a) Statement of the excess of amortization over normal depreciation, and tax deferments from amortization, for the L.& N. and the N.C.& St.L. for the years 1950 to 1954, inclusive.

(b) Restatement of L.& N. and N.C.& St.L. income accounts for the years 1950 to 1954, inclusive, and the first six months of 1955, to show what the earnings of each company would have been for the years and periods stated had each not had the benefit of the substantial tax reduction resulting from amortization.

(c) Statement of estimate of losses, if any, in traffic (carloads or tonnage) and in revenue expected to result from merger.

(d) A statement giving an estimate of the increases, if any, in traffic (carloads or tonnage) and in revenue expected to result from the proposed merger.

(e) A statement giving details of the savings expected to result from:

(1) Coordination of train and terminal operations.

(2) Consolidation of repair shops.

(3) Combining the accounting and clerical work on joint traffic.

(4) Merging the rate and sales force of the two companies.

(5) Reduction in supervisory forces.

Counsel Requesting

2. **July 11, 1955 (Continued)** — MR. BOLES (Continued)

(f) A copy of the lease under which the N.C.& St.L. operates the line of road between Chattanooga and Atlanta.

(g) A copy of the lease under which the N.C.& St.L. operates the line of road between Paducah and Memphis.

(h) A statement showing by major projects, and estimated costs thereof, all additions, betterments, and improvements to roadway and structures and to equipment contemplated by the L.& N. and the N.C.& St.L. for the current year and such additional period as will be required to complete the projects now in contemplation.

All of the foregoing information was supplied.

3. **July 21, 1955**

Requested by letter dated July 21, 1955: — MR. BOLES

(a) Freight and passenger car statistics of the L.& N. and the N.C.& St.L.

(b) Information as to the percentage of the N.C.& St.L. stockholders voting for and against the merger.

The foregoing information was supplied.

4. **August 24, 1955**

Requested (Tr. 200-201): — MR. WALLER

(a) The number of revenue cars handled in and out of Nashville by the L.& N. and N.C.& St.L. for the years 1953 and 1954.

This information was supplied.

5. August 24, 1955 — Counsel Requesting: MR. WALLER

Requested (Tr. 211):

(a) Correspondence relating to two changes in the routing agreement between the L.& N. and N.C.& St.L.

This correspondence was supplied.

6. August 24, 1955

Requested (Tr. 222): — MR. WALLER

(a) The record of tons interchanged between the L.& N. and N.C.& St.L. at Nashville for the years 1951 through 1954.

This information for 1953 and 1954 was supplied.

7. August 24, 1955

Requested (Tr. 236): — MR. WALLER

(a) Written report made by Mr. Tilford to the Board of Directors of the L.& N. giving the reasons for the merger.

This information was supplied.

8. August 24, 1955

Requested (Tr. 288): — MR. BOLES

(a) Number of shares of minority stock of N.C.& St.L. voting for and against the merger.

This information was supplied.

9. **August 24, 1955** — **Counsel Requesting: MR. BOLES**

Requested (Tr. 289):

(a) Number of shares owned by L.& N. and affiliates voting for and against the merger.

This information was supplied.

10. **August 24, 1955** — **MR. BOLES**

Requested (Tr. 305-306):

(a) The location and number of traffic solicitors of the L.& N. before and after the merger.

This information was supplied.

11. **August 24, 1955** — **MR. BOLES**

Requested (Tr. 311):

(a) Coal tonnage terminating on the L.& N.

(b) Average coal ton-mile rate.

The information in (a) was supplied. The information in (b) was not available.

12. **August 24, 1955** — **MR. LYMAN**

Requested (Tr. 334-335):

(a) A showing for the L.& N. and N.C.& St.L. of all points where job changes will result from the merger.

(b) The nature of the changes at each such point.

(c) The number of employees in each craft that will be involved at each of these points, both as to jobs abolished or jobs added.

This information was supplied.

13. August 25, 1955 — Counsel Requesting:

Requested (Tr. 521): — MR. WALLER

(a) Assessments of the L.& N. for the year 1954 in each state in which it operates and the ad valorem taxes paid in each of those states.

The information was not supplied.

14. August 26, 1955

Requested (Tr. 822): — MR. BOLES

(a) Proposed N.C.& St.L. expenditures for repairs and additions and betterments in the Roadway and Mechanical Departments for 1955.

This information was supplied.

15. August 26, 1955

Requested (Tr. 831-832): — MR. WALLER

(a) The number of N.C.& St.L. accounting employees now and in 1947.

This information was supplied.

16. August 26, 1955

Requested (Tr. 997): — MR. BOLES

(a) Equipment trust maturities for the L.& N. and the N.C.& St.L. for 1954.

This information was supplied.

17. **August 31, 1955** — Counsel Requesting: MR. HARWOOD

Requested (Tr. 1529):

(a) The basic data from which Exhibit H-62 was made.

Applicants agreed to make the underlying data available to him and did the equivalent through the issuance of a corrected sheet 1 to Exhibit H-62.

18. **September 13, 1955** — MR. BOLES

Requested (Tr. 1692):

(a) Tonnage interchanged at Nashville between L.& N. and N.C.& St.L. for the years 1951-54.

This information for the years 1953-1954 was supplied.

So great had been the calls of this kind on applicants, notwithstanding the completeness of their presentation under the Commission's requirements, that as the final hearing was coming to a close, counsel for applicants quite justifiably used this language ". . . we have had to make up so many figures and so much stuff at the request of the other parties in this record . . ." (Tr. 1697).

APPENDIX C.

Reproduction of Constitutional and Statutory Provisions Referred to in the Brief

Amendments to The Constitution of the United States

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

TITLE 5 U. S. C.

§ 1007. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Prior to each recommended, initial, or tentative decision, or decisions upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

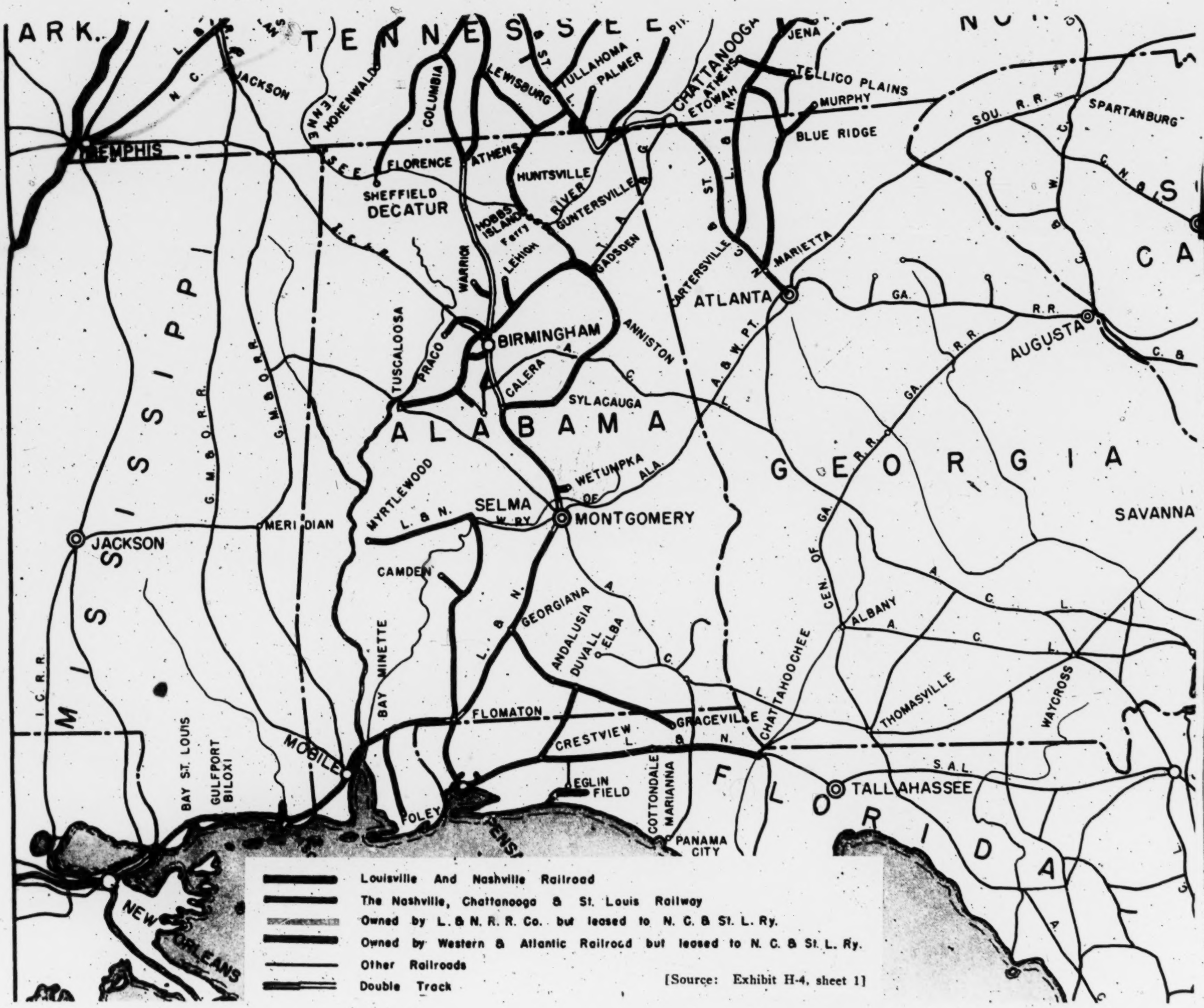
TITLE 15 U. S. C.

§ 4. Jurisdiction of courts; duty of district attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.



Louisville And Nashville Railroad
The Nashville, Chattanooga & St. Louis Railway
Owned by L. & N. R. R. Co. but leased to N. C. & St. L. Ry.
Owned by Western & Atlantic Railroad but leased to N. C. & St. L. Ry.
Other Railroads
Double Track

[Source: Exhibit H-4, sheet 1]

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

§ 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

Preceding § 1

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantage of each; to promote safe, adequate economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to co-operate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

§ 5. Combinations and consolidations of carriers—Pooling; division of traffic, service, or earnings

Unifications, mergers, and acquisitions of control

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers, jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through

ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of

the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * *

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Investigation by Commission of effectuation of control by non-prescribed methods

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this

chapter; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

Jurisdiction of injunctions, etc., against violations of section or orders

(8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

Supplemental orders by Commission

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

Plenary nature of authority under section

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this

section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so

prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

(2) **Orders of commission.** Except as otherwise provided in this chapter, all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.

(8) **Shippers choice of route to be observed.** In all cases where at the time of delivery of property to any railroad corporation being a common carrier for transportation subject to the provisions of this chapter to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this chapter provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

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No. 365

In the Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF NASHVILLE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

ROBERT W. GILEAN,
Assistant Attorney General,
[illegible],
Washington 25, D. C.

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MOTION TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission, pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, move that the final judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on June 20, 1957, by a three-judge court convened pursuant to 28 U. S. C. 2325, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. This order, dated March 1, 1957, and entered in *Louisville & Nashville Railroad Company et al. Merger, etc.*,

295 I. C. C. 457, authorized a merger of the Nashville, Chattanooga & St. Louis Railroad into the Louisville & Nashville Railroad Company. In the same order, the Commission approved the acquisition of direct control, through stock ownership of the surviving corporation, by the Atlantic Coast Line Railroad Company, and of indirect control of the surviving corporation by the Atlantic Coast Line Company.[1]

L. & N. has controlled the N. C. & St. L. through stock ownership since 1880. Since 1872, the two railroads have participated in a solicitation agreement which was investigated by the Commission and reported to the United States Senate in *Financial Relations, etc., L. & N. Railroad Co.,* 33 I. C. C. 168 (1915). Pursuant to the Transportation Act of 1920, the Commission, in both its tentative and final plans of railroad consolidation, placed N. C. & St. L. in the same system with L. & N. and the Atlantic Coast Line (63 I. C. C. 455, 460; 159 I. C. C. 522, 534).

On January 28, 1955, the application for approval of the proposed merger under Section 5 (2) of the Interstate Commerce Act was filed with the Commission. Sectior 5 (2) provides that it shall be lawful, with the approval and authorization of the Commission, for two railroads to merge their properties or franchises into one corporation for management and operation, if the Commission finds the merger "con-

[1] The Commission found that L. & N. has been controlled, through stock ownership, since 1902 by the Atlantic Coast Line Railroad Co., which in turn is controlled by the Atlantic Coast Line Company (295 I. C. C. 461).

sistent with the public interest." Section 5 (2) (c) provides that in exercising its judgment in determining whether or not a particular merger is within the public interest, the Commission shall give weight (1) to the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected. Section 5 (2) (f) provides that in the case of a transaction involving railroads, the Commission must impose conditions for the protection of railroad employees affected by its order. Section 5 (11) provides that upon Commission approval of a merger the parties are exempt from the operation of the antitrust laws, and all other prohibitions of law, both State and Federal, which would prevent them from carrying out the transaction.[2]

The appellants City of Nashville, Davidson County, Tennessee, the State of Tennessee, and the Tennessee Public Service Commission, intervened before the

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[2] The Commission's order in this case also authorized L. & N., pursuant to Section 20a of the Interstate Commerce Act, to issue shares of its common stock in exchange for the publicly held shares of the N. C. & St. L. In the court below, no party challenged this portion of the Commission's order. However, subsequent to the entry of the judgment below, certain holders of common stock of N. C. & St. L. brought suit in the United States District Court for the Southern District of New York challenging the Commission's order insofar as it approves the issuance of 1½ shares of L. & N. common stock in exchange for each share of common stock of N. C. & St. L.

Commission in opposition to the proposed merger, as did certain common stockholders of N. C. & St. L. and the N. C. & St. L. Employees Job Protection Association (together with Luther Lambert and Vernon Hedgepath as employees of N. C. & St. L.).[3] No carriers opposed the application.

Hearings before a hearing examiner were conducted at Washington, D. C. from August 23 through August 26, 1955, at Nashville from August 30 to September 1, and again at Washington on September 13, 1955. Thereafter, the hearing examiner issued his report recommending that the Commission authorize the merger. Following exceptions to this report, oral argument was heard by the entire Commission. On March 1, 1957, the Commission issued its report and order authorizing the merger (295 I. C. C. 457). Its report concludes:

> We find, subject to the conditions for the protection of railway employees and the maintenance of existing joint routes, interchange arrangements and switching practices referred to above, that acquisition of control of the properties and franchises of The Nashville, Chattanooga and St. Louis Railway through merger into the Louisville and Nashville Railroad Company for ownership, management, and operation and acquisition of control by the Atlantic Coast Line Railroad Company of the surviving corporation through ownership of capital stock, and indirect control of such corporation by the Atlantic Coast Line Company as described

[3] The Association, Lambert and Hedgepath have taken a separate appeal from the judgment below in No. 519.

herein, are transactions within the scope of section 5 (2) of the Interstate Commerce Act, as amended; that the terms and conditions proposed are just and reasonable; and that the transactions will be consistent with the public interest.

On March 29, 1957, the City of Nashville instituted the present action and sought a temporary restraining order. On April 8, after a hearing, Judge Martin issued a temporary restraining order staying the effectiveness of the Commission's order pending determination of the case on the merits by a three-judge court. Also, on or about April 8, the State of Tennessee, the Tennessee Public Service Commission, Davidson County, certain employees of the N. C. & St. L., and the N. C. & St. L. Railway Employees Job Protection Association were permitted to intervene in support of the complaint, and the L. & N. and N. C. & St. L. were permitted to intervene as defendants. On April 24, 1957, the court entered an order permitting the plaintiffs to amend paragraphs 4 and 16 of their complaint.

Following briefs and oral argument on the merits before the three-judge court, it entered, on May 24, 1957, its unanimous findings of fact and conclusions of law sustaining the Commission's order and dismissing the complaints. Its judgment was entered on June 20, 1957.

The three-judge court conditioned a stay of its judgment pending appeal upon the appellants' posting a bond of $100,000. On August 15, Mr. Justice Brennan denied appellants' application for a stay of judgment without a bond.

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ARGUMENT

Most of the twelve questions presented by the appellants either ignore controlling decisions of this Court or are based upon out-of-context excerpts from the Commission's detailed report. None of them involves a substantial question.

1. In approving the merger of these two railroads, the Commission made the findings required by Section 5 (2) (b), *i. e.*, that the merger would be just and reasonable upon the terms prescribed by the Commission and that it is consistent with the public interest. The Commission concluded, citing this Court's decision in *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 25, that "In administering these provisions we are to be guided primarily by consideration for adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." And the Commission added that "Our task is to 'estimate the scope and appraise the effects of the curtailment of competition which will result * * * and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.' *McLean Trucking Co.* v. *United States*, 321 U. S. 67" (295 I. C. C. 502–503).

2. The appellants contend (Juris. St. 13–16) that the Commission erred as a matter of law in authorizing a merger of "two strong railroads" and in concluding that

> The provisions of section 5 (2) of the act do not contemplate the unification of only those railroads which no longer can continue under separate ownership. The purpose of the law is to *foster and promote* the voluntary union of carriers into a sound and adequate transportation system for the future, and such union is permissible if it is otherwise consistent with the public interest.

We submit that it is clear on the face of Section 5 that its authorization of mergers approved by the Commission is not limited to weak or failing carriers. In *New York Central Securities Co.* v. *United States*, *supra*, sustaining an order of the Commission approving a lease to New York Central Railroad Co., of the properties of the Big Four railroad, there was no suggestion that the Commission's power was contingent upon one of those carriers being in poor financial condition or otherwise unable to operate independently. Similarly, in *McLean Trucking Co.* v. *United States*, *supra*, this Court's decision, upholding a Commission order authorizing a merger of seven large motor carriers, was in no way based upon a finding that some or all of such carriers were "weak" carriers.

The appellants' quarrel is with the Congress when they attack (Juris. St. 14–15) the statement in the Commission's report that the purpose of the merger provisions of Section 5 "is to foster and promote the voluntary union of carriers into a sound and adequate transportation system for the future, and such union is permissible if it is otherwise consistent with the

public interest." The appellants' real contention, that preservation of competition is the controlling legislative policy in Section 5, was rejected by this Court in *McLean Trucking Co. v. United States*, *supra*. Indeed, in that case, the Court went on to recognize that "authorization of consolidation of rail carriers stems historically from circumstances different from those impelling the authorization of consolidation of motor carriers" (321 U. S. at 85, fn. 22). And, after reviewing the history of the Act, it recognized "the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business" (321 U. S. at 83).

The appellants also suggest that the Commission authorized the merger solely to "enable the surviving company to meet more effectively competition from other modes of transportation" (Juris. St. 15, 17). But the Commission found that "the accompanying savings and improved efficiency of operation necessarily would strengthen the applicants and render them capable of better service" (295 I. C. C., at 504); that "Single ownership and control of the properties will tend toward a more economical and efficient operation which, in turn, will inure to the benefit of the shipping public" (295 I. C. C. at 505); and "that the merger would strengthen the resulting system and make it more capable of rendering effective competition with the other railroads serving the South Atlantic coastal area" (295 I. C. C. at 488). In any

event, assuming, as does the National Transportation Policy, that a sound system of railroads is one component of an adequate national transportation system, it was entirely proper for the Commission to consider the extent and impact of competing modes of transportation and the ability of the combined railroads to compete with them.

The appellants' faint suggestion that the two railroads "are naturally competitive rather than complementary" (Juris. St. 16) and that this alleged circumstance precludes approval of their merger under Section 5, flies in the face of this Court's conclusion in *New York Central Securities Co.* v. *United States*, 287 U. S. at 26, that "whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case."

2. The L. & N. has controlled the N. C. & St. L. through stock ownership since 1880. The Commission found that these two railroads "have been closely coordinated in service, operation, and managerial relations for more than 75 years" (295 I. C. C. at 486); that "under such circumstances, it cannot be said that an antagonistic competitive situation has existed between them" (*id.*, p. 486); and "that the reduction in competition resulting from the merger would be consistent with the public interest" (*id.*, p. 488). The appellants, asserting that this relationship violated the Sherman Act (enacted in 1890), contend that the Commission erred in approving the merger without

first ascertaining the competition which would have existed between these railroads if this relationship had not existed since 1880 (Juris. St. 18).

As this Court noted in *McLean Trucking Co.* v. *United States, supra,* at page 79 "the Commission has no power to enforce the Sherman Act as such." Congress has neither required nor empowered the Commission to determine the complicated factual issue of whether the acquisition of control of N. C. & St. L. by L. & N. in 1880 constituted or produced (then or later) an unreasonable restraint of trade or commerce in violation of the Sherman Act. Moreover, it would be impossible to estimate what would have been the competitive situation between these two railroads if the control relationship had never existed. Such a speculative rewriting of history could produce only conjecture over countless combinations of relationships between them and between each of them and other carriers. Significantly, there was no hint of such a requirement in *New York Central Securities Co.* v. *United States, supra,* in which this Court sustained the Commission's order under Section 5 approving long-term leases by the New York Central Railroad of the properties of Big Four and Michigan Central. New York Central had acquired stock control of those railroads long prior to 1920 (as here) and there already existed a substantial coordination of the three railroads.

Appellants also suggest that the Commission departed from its own policy in approving a merger when there allegedly was a prior and unlawful acquisition of control (Juris. St. 23). Of course, Sec-

tion 5 of the Interstate Commerce Act is prospective only; it does not require a historical review of pre-1920 mergers from which every major carrier in the country evolved. The Commission has both approved and disapproved, in terms of overall public interest, applications for approval of transactions subject to Section 5 where there had been prior acquisitions of control without approval under Section 5. We are aware of no case in which the Commission has withheld approval of an application under Section 5 because of the asserted illegality of relationships entered into prior to the enactment of Section 5 in 1920.[4]

3. The appellants contend (Juris. St. 27–29) that under Section 5 (2) (c) the impact of the proposed merger upon employees of the carriers precluded the Commission from approving it. Section 5 (2) (c) provides that "In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from

[4] The lack of merit of the appellants' second question is further evidenced by the fact that in 1915, following an investigation made at the request of the United States Senate, the Commission published the facts relating to L. & N.'s acquisition and exercise of control of N. C. & St. L., 33 I. C. C. 168. During the argument of the instant case before the three-judge court, counsel for the appellants conceded that they knew of no complaint of violation of the Sherman Act made by any of the appellants during the intervening 42 years.

the proposed transaction; and (4) the interest of the carrier employees affected." Section 5 (2) (f) generally provides that in approving a merger of railroads the Commission shall protect their employees "affected by such order [from] being in a worse position with respect to their employment" for a period of not less than four years. See *Railway Labor Executives Association* v. *United States*, 339 U. S. 142. Specifically, the appellants contend that the Commission erred in not giving controlling weight to the fact that some of the savings produced by the merger will result in reduction in employment and dislocation of other employees, and in not following an earlier decision in *Ft. Worth & D. C. Ry. Co. Lease*, 247 I. C. C. 119, in which one of several reasons for refusing to approve a lease of railroad properties was that the resulting savings for the first four years would be absorbed by the cost of the employee protective conditions.

We do not deny that a considerable portion of the savings resulting from this merger is in the form of reduced employment. Section 5 (2) (c), in requiring the Commission to "give weight" to "the interest of the carrier employees affected," can mean only that the Commission is not to approve a merger which produces savings which are insignificant compared to the dislocation of employees. If it means, as appellants contend, that as a matter of law the impact upon employees prohibits the Commission from approving a railroad merger which will result in estimated savings of at least $3,000,000 annually, then the possibilities of railroad consolidations under Section 5 in the

interest of an efficient and economical transportation system are illusory.

Finally, the merit of this contention of the appellants is sufficiently indicated by the fact that they have not yet challenged the Commission's finding, 295 I. C. C. at 502, that the labor protective conditions "which we hereby adopt, are more favorable than any heretofore imposed in merger cases."

The appellants further contend that the three-judge court violated the principle of *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, by sustaining the Commission's order (in Conclusion of Law No. 11, Juris. St., p. 13a) "upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway Company shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved herein, disclosed in finding of fact Number 15." The appellants lack standing to raise such an issue. Moreover, they created it in the district court by arguing that the Commission had determined that the loss of jobs in the Nashville area would fall upon the employees of N. C. & St. L. The "condition" imposed by the court below merely reflects the obvious explanation of the Commission's counsel that the pertinent passage of its report merely identifies the jobs which will be affected and that the Commission is without power to determine the par-

ticular employees of the combined carriers who will be displaced or otherwise affected (See 295 I. C. C. at 500).

4. The appellants contend (Juris. St. 30–38) that the Commission erred in not requiring L. & N. to produce studies made by certain of its subordinate officials as to what traffic now handled by the two railroads would be lost as a result of the merger. These studies were sought to contradict the testimony of L. & N. officials that little if any traffic would be so lost. Clearly, the Commission was not required to permit an opinion poll of subordinate employees of L. & N. Moreover, a former officer of N. C. & St. L. testified for the appellants as to the results of such studies. The court below correctly held that there was no prejudicial error in the exclusion of this material. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 229–231.

Similarly, it is contended that the Commission erred in not requiring the two railroads to produce information as to the number of employees in their respective accounting departments before machine accounting was installed, as compared with the number at the time of the hearing (Juris. St. 33–35). While admitting that the merger would produce accounting savings, appellants sought this information to attempt to prove that those departments were overstaffed. In view of the collateral nature of this issue, the Commission's refusal to require production of the data was well within the discretion of the trier of facts in a large and complicated proceeding. In any event, the matter relates only to an unspecified

portion of estimated annual accounting savings of $369,000 (295 I. C. C. at 491) out of total estimated annual savings of more than $3,000,000 (295 I. C. C. at 492).

The appellants also complain of the Commission's refusal to require the railroads to produce figures as to the number of cars interchanged between them at Nashville in 1951 and 1952, which appellants contend would show the effect of a 1951 change in a solicitation agreement between the two railroads which had existed since 1872 (Juris. St. 35–36). Not only was this a collateral inquiry, but it was embraced in the appellants' erroneous contention that the Commission must appraise the merger in the light of the competition that might have existed in the absence of a control relationship between them since 1880.

5–7. The appellants' contention (Juris. St. 38–39) that the three-judge court failed to discharge its reviewing function is wholly without merit under *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87–88, and *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488. The Federal courts have recognized repeatedly the broad range of discretionary responsibility which Section 5 imposes upon the Commission with respect to carrier mergers and consolidations. The appellants' related attack upon the Commission's evaluation of the evidence is no more than a contention that the three-judge court should have substituted its judgment for that of the Commission upon an independent evaluation of fragments of the record.

8–9. The appellants' contentions that the Commission's findings do not satisfy the requirements of Section 8 (b) of the Administrative Procedure Act (5 U. S. C. 1007 (b)), and that its conclusion that the proposed merger will be consistent with the public interest is not supported by the record (Juris. St. 44–45), find their best answer in the Commission's detailed report (295 I. C. C. 457–507). The three-judge court concluded (Juris. St. 10a): "The findings of the Commission are full and complete and are supported by substantial evidence. They constitute sufficient basis for the order of the Commission herein."

10. It is further contended that the Commission's order is void on the ground that N. C. & St. L., a Tennessee corporation, is not authorized by Tennessee law to merge into another corporation (*i. e.*, L. & N.). From this premise, the appellants apparently argue (1) that the Commission's order is permissive and does not undertake to confer authority not given by State law, (2) that Section 5 (11) of the Interstate Commerce Act does not empower the Commission to authorize a merger not authorized by State law, and (3) that if Section 5 (11) is not so interpreted it violates the Tenth Amendment (Juris. St. 45–50).

All Commission orders authorizing transactions covered by Section 5 are permissive. In this case, the Commission's order expressly authorized "acquisition of control of the properties and franchises of the Nashville, Chattanooga & St. Louis Railway *through merger* into the Louisville & Nashville Railroad Company." Clearly, the Commission intended

to, and did, authorize completion of the merger without regard to Tennessee law.[8] In *Seaboard R. Co.* v. *Daniel*, 333 U. S. 118, 124, an identical claim as to the purport of a Commission order under Section 5 was brushed aside by this Court.

Section 5 (11) specifically empowers carriers participating in a merger approved by the Commission to carry it out without regard to state law. Thus, Section 5 (11) provides in part that—

> The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees, and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and

[8] The Commission's intention is further indicated by its denial of the appellants' motion to dismiss the application under Section 5, based upon the same contention as to Tennessee law (295 I. C. C. at 459.)

> operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

The appellants' contention that Section 5 (11) does not supply omissions in Tennessee law has been rejected already by *Seaboard R. Co.* v. *Daniel, supra,* in which this Court held that the last sentence of Section 5 (11) "clearly authorizes a railroad corporation to exercise the powers therein granted over and above those bestowed upon it by the state of its creation" (333 U. S. at 126). See also *Schwabacher* v. *United States,* 334 U. S. 182, 198; *Texas* v. *United States,* 292 U. S. 522, 530–531.

Appellants' contention that Section 5 (11) violates the Tenth Amendment if it is interpreted to authorize this merger is also without merit. The plenary power of Congress to regulate interstate commerce is not subordinated by the Tenth Amendment to the regulatory policies of a State. *New York* v. *United States,* 257 U. S. 591; *Colorado* v. *United States,* 271 U. S. 153.* And see *Steward Machine Co.* v. *Davis,* 301 U. S. 548; *Helvering* v. *Davis,* 301 U. S. 619; *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *United States* v. *Darby,* 312 U. S. 100.

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* *Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315, the appellants' sole reliance, expressly distinguishes the rule of the *New York* and *Colorado* cases.

11. It is further contended by the appellants that the Commission's order is invalid because the Mercantile-Safe Deposit & Trust Company did not join in the application for approval of the merger. In the instant proceeding, the Commission found that L. & N. is controlled by the Atlantic Coast Line Railroad Company which owns 35.2% of its common stock, and that the latter is controlled by the Atlantic Coast Line Company, which owns 28.58% of its voting stock (295 I. C. C., at 461). Both of those companies joined in the application and obtained the Commission's approval of their acquisition of direct and indirect control, respectively, of the surviving railroad in the merger. Although the appellants participated fully in the proceedings before the Commission, they contended for the first time in the court below that Mercantile-Safe Deposit & Trust Co. controlled the Coast Line Company and, therefore, was a necesssary party to the application under the doctrine of *United States* v. *Marshall Transport Co.*, 322 U. S. 31.

In *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151, this Court held that the failure to join a remote non-carrier parent company (such as the Trust Company) does not deprive the Commission of jurisdiction over more direct parent companies and the carriers controlled by them. Since the failure of the Trust Company to join in the application was not a jurisdictional defect, the appellants' failure to raise the issue before the Commission precludes them from doing so for the first time in the courts. *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291; *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37.

12. Finally, the appellants contend that the Commission's order is invalid under Section 15 (2) of the Interstate Commerce Act, which provides that "all orders of the commission, * * * shall take effect within such reasonable time, not less than thirty days, * * * according as shall be prescribed in the order, * * *."

The Commission's order was dated March 1, 1957, and specified "that this order shall become effective 40 days from its date"—or April 10. Due to delay in duplicating the 75-page report and order, it was not released until March 13—or 28 days before its effective date. However, when the matter was first called to the Commission's attention by paragraph 19 of the complaint, the Commission, on April 3, 1957, postponed the effective date of its order to April 12. This was done for the sole purpose of avoiding unnecessary litigation of the question. On April 8, Judge Martin issued a temporary restraining order staying the effectiveness of the Commission's order pending determination of the suit on the merits by a three-judge court. Thereafter, the appellants twice amended their complaints. Under these circumstances, their contention that they were prejudiced is frivolous.

CONCLUSION

The judgment of the three-judge district court should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 519

LUTHER THOMAS LAMBERT, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.

LUTHER THOMAS LAMBERT, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

Appellants, Luther Thomas Lambert, Vernon H. Hedgepath, and the NC&StL Railway Employees Job Protection Association, appeal from the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, entered on June 20, 1957, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that substantial questions requiring plenary consideration are presented.

Opinion Below

There was no written opinion issued by the court below. Instead, the District Court filed findings of fact and conclusions of law, which have not been reported. Copies

of the findings of fact and conclusions of law and judgment are attached to the jurisdictional statement filed by appellants, City of Nashville, Tennessee, et al. as Exhibit A, and need not be repeated herein.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1253 and Section 2101 (b).

This suit was brought under 28 U.S.C., Sections 1336 and 2284 by the City of Nashville, Tennessee, to enjoin, set aside and annul an order of the Interstate Commerce Commission, authorizing, among other things, the merger of the Nashville, Chattanooga & St. Louis Railway into the Louisville & Nashville Railroad Company, and the acquisition of direct control by the Atlantic Coast Line Railroad Company of the surviving corporation and indirect control of such corporation by the Atlantic Coast Line Company.

Pursuant to 28 U.S.C. Section 2323, appellants herein, the NC&StL Railway Employees Job Protection Association, and Luther Thomas Lambert and Vernon H. Hedgepath, individually, and as representatives of a class composed of 839 employees of the Nashville, Chattanooga & St. Louis Railway who would be directly affected by the proposed merger, intervened in the suit as intervening plaintiffs. The State of Tennessee, Tennessee Public Service Commission, and Davidson County, Tennessee also intervened as plaintiffs. All plaintiffs alleged invalidity of the order of the Commission on various grounds.[1]

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[1] For convenience, the Nashville, Chattanooga & St. Louis Railway will be referred to as the Tennessee Company, the N. C. & St. L., or the N. & C.; the Louisville & Nashville Railroad Company as the Kentucky Company or the L. & N.; the Atlantic Coast Line Railroad Company as the Coast Line; the Atlantic Coast Line Company as the Connecticut Company; the Interstate Commerce Commission as the I.C.C. or the Commission; and the NC&StL Railway Employees Job Protection Association as the Employee Association.

The complaint, and the intervening complaints of appellants, were filed in the United States District Court for the Middle District of Tennessee at Nashville, presided over by District Judge William E. Miller. On account of illness, Circuit Judge John D. Martin, sitting by designation, issued a temporary restraining order on April 8, 1957.

Although 28 U.S.C. Section 2284 provides that at least one of the two other judges shall be a Circuit Judge, the Chief Judge of the Sixth Circuit designated, to sit with Judge Martin, District Judges Leslie R. Darr and Roy M. Shelbourne for the hearing of the applications for an interlocutory injunction. It was agreed that the hearing would be a final hearing on the merits upon demand for a permanent injunction. After such hearing, the District Court entered findings of fact and conclusions of law on May 24, 1957, and judgment was entered on June 20, 1057, dismissing the complaint and intervening complaints. Notices of appeal were filed by the plaintiff and intervening plaintiffs in the United States District Court for the Middle District of Tennessee, Nashville Division, on July 26, 1957, after the Commission had issued a new order, dated July 10, 1957, fixing August 14, 1957, as the new effective date of its original order.

If it be assumed that the three-judge Court had jurisdiction to dismiss the complaints, the following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Radio Corp. of America* v. *United States* (1950), 341 U.S. 412; *Swift & Co.* v. *United States* (1952), 343 U.S. 373; *Railway Labor Executives Ass'n.* v. *United States* (1950), 339 U.S. 142.

Questions Presented

The following questions are presented by this appeal:[2]

1. (a) Whether under the guise of imposing what are alleged to be (but in actuality are not) liberal protective conditions for the benefit of the carrier employees affected, the Commission may lawfully ignore their interest, or fail to give it proper weight, in determining in the first instance whether a merger is consistent with the public interest as specifically required by Section 5(2)(c) of the Interstate Commerce Act.

(b) Of the two enumerated factors at issue in this cause required by Section 5(2)(c) of the act to be considered in passing upon a merger, whether the Commission is required, or is permitted, to give primary consideration to the factor involving service and a lesser or secondary consideration to the interest of the employees, and then to approve the merger notwithstanding the Commission's affirmative finding that there will be no immediate and direct improvement in the service to the public.

2. (a) Whether the Commisssion may approve a merger of two railroads where its order of approval does not require the fair and equitable arrangement to protect the interests of the railroad employees affectsd contemplated by Section (2)(f) of the Interstate Commerce Act.

(b) Whether the District Court, on review, may lawfully revise or amend an order of the Interstate Commerce Commission; or, whether it is limited to sustaining or setting

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[2] The City of Nashville, Tennessee, State of Tennessee, Tennessee Public Service Commission, and Davidson County, Tennessee, have also filed their notice of appeal and jurisdictional statement with this Court. In the notice of appeal filed on behalf of appellants herein, it was requested that the two appeals be consolidated, or, heard by the Court at the same time. Appellants herein adopt and rely on the questions presented as set forth in the jurisdictional statement of the City of Nashville, et al., in addition to those set forth herein.

aside such order; or to remanding the case to the Commission.

3. Whether the District Court may sustain an order of the Interstate Commerce Commission where the Commission did not have before it at the time the case was decided and therefore did not consider material exhibits to the proceedings which were filed subsequent to the hearing before the Commission pursuant to instructions from the Hearing Examiner.

Statutes Involved

The pertinent portions of the statutes involved in this jurisdictional statement are set forth in Appendix B hereto, including provisions of the Administrative Procedure Act and the Interstate Commerce Act. Other portions of these statutes, as well as different statutes are set forth in detail in Appendix B to the jurisdictional statement of appellants, City of Nashville, et al.

Statement of the Case

By application dated January 28, 1955, the Kentucky Company and the Tennessee Company applied for authority to merge the properties and franchises of the latter into the former for ownership, management and operation. The Connecticut Company and the Coast Line joined in the application because of their control through stock ownership of the Kentucky Company. The application stated that the Kentucky Company controls the Tennessee Company through ownership of 74.9 per cent of its capital stock; that the Coast Line controls the Kentucky Company through ownership of 35.2 per cent of its common capital stock; and that the Connecticut Company controls the Coast Line through ownership of 28.28 per cent of its common and preferred capital stock. It also stated that the Kentucky Company, the Tennessee Company and the Coast Line were

being operated and managed as separate entities. The allegation was also made that approval of the merger would result in a materially improved service to the public.

Hearings were held before an Examiner, who issued a proposed report, dated June 21, 1956, wherein he recommended approval of the application. Various parties filed exceptions to the Examiner's proposed report alleging that numerous errors had been committed by the Examiner. Oral argument was heard by the full Commission, which subsequently issued its report and order, both dated March 1, 1957, approving the merger, to be effective forty days from date. The said report and order, however, were not released and served on the parties until March 13, 1957, and were made effective, therefore, less than thirty days from the date of service.

The complaint, as amended, and the intervening complaints, as amended, challenged the validity of the Commission's order on the various grounds reflected in the "Questions Presented" as set out earlier herein, and as set forth in the jurisdictional statement of the appellants, City of Nashville, Tennessee, et al., heretofore filed with this Court, and upon which these appellants also rely and which they adopt. Answers of the defendants and intervening defendants were duly filed and the case was tried on the record, oral stipulations and statements of counsel in open court, and one exhibit filed by the plaintiff, City of Nashville, Tennessee.

Following the hearing on the merits the District Court did not render an opinion discussing the questions presented by the complaint and intervening complaints (and again presented on appeal by the various appellants). Instead, it filed "Findings of Fact" and "Conclusions of Law." Said conclusions of law are to the effect that the Commission's findings are supported by substantial evi-

dence, and that the errors complained of by the plaintiffs did not constitute prejudicial error.

The District Court refused to approve unconditionally the order of the Commission as issued by the Commission. In its Conclusion of Law No. 11, the Court recites a portion of the statute, 49 U.S.C. Section 5(2)(f), which provides that "As a condition to its approval . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." Presumably the Court felt that the Commission's order, as issued, did not comply with the statute because it stated that its approval of said order was "based upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway shall be protected equally with with those of employees of the Louisville & Nashville Railroad Company as relates to seniority and to other conditions of employment . . ." The uncontradicted testimony of applicants' witnesses is that *all* dismissals and transfers would come from the employees of the Nashville, Chattanooga & St. Louis Railway, rather than from employees of both railroads. In spite of the conclusion of the Court that the Commission's order did not comply with the requirements of Section 5(2)(f), it nevertheless dismissed the complaint and the intervening complaints.

The Questions Presented Are Substantial, Requiring Plenary Consideration

The lives of 839 employees and their immediate families will be directly affected by the Court's decision of this case, and the interpretation of the statutes involved will determine the rights of untold thousands of employees who will be affected by railroad mergers in the years to come.

In order to avoid repetition of a discussion of the questions raised by the appeal of the City of Nashville, Ten-

nesee, et al., and upon which appellants herein also rely, the questions presented hereinabove, and the discussion which is to follow have been confined to those involving the extent and the nature of the consideration which must be given to "the interest of the carrier employees affected" and the other considerations specified in Sections 5(2)(c) and (f), 49 U.S.C., in passing upon mergers and consolidations of carriers.

Question 1

(a) Whether under the guise of imposing what are alleged to be (but in actuality are not) liberal protective conditions for the benefit of the carrier employees affected, the Commission may lawfully ignore their interest, or fail to give it proper weight, in determining in the first instance whether a merger is consistent with the public interest as specifically required by Section 5(2)(c) of the Interstate Commerce Act.

(b) Of the two enumerated factors at issue in this cause required by Section 5(2)(c) of the act to be considered in passing upon a merger, whether the Commission is required, or is permitted, to give primary consideration to the factor involving service and a lesser or secondary consideration to the interest of the employees, and then to approve the merger, notwithstanding the Commission's affirmative finding that there will be no immediate and direct improvement in the service to the public.

While this Court has interpreted Section 5(2)(f) of the act relating to transactions such as the instant one,[3] it has not been called upon to interpret Section 5(2)(c) of the act

[3] *Railway Labor Executives' Ass'n. v. United States*, 339 U.S. 142 (1950).

in the respect here at issue. This section provides that the Commission shall "give weight to the following considerations, among others; (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

In *McLean Trucking Co., Inc. et al.* v. *United States*, (1944) 321 U. S. 67, at page 76, this Court did hold that the "foregoing provisions supply the general statutory standards for guiding the Commission's judgment. . . ." In the *McLean* case only three of the above provisions were at issue, while in the instant case only two are at issue; namely, (1) and (4).

Furthermore, at page 69 of the opinion, the Court pointed out that the employees' bargaining representatives (International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) ultimately supported the application, and at page 88 of the opinion it was specifically noted that the Commission found that the proposed consolidation would result in improved transportation service to the public.

At no place in the Commission's report concerning the instant case, is there any statement or finding that the Commission evaluated the gains or advantages which reasonably may be expected to accrue to the public in point of transportation service and weighed them against the "admitted adverse affect" upon the carrier employees involved. In fact, there is no statement or finding of any kind to indicate that it gave *any* consideration to the "admitted adverse affect" upon the employees in determining whether

the proposed transaction is consistent with the public interest.

This is in sharp contrast to the Commission's previous interpretations of Section 5(2)(c) of the act, as amended, when passing upon other transactions of this kind.

The first case presented to the Commission after the 1940 amendment of the act which required an interpretation of Section 5(2)(c) was the case of *Ft. Worth & D. C. Ry. Co., Lease*, 247 I.C.C. 119. The application in that case was filed *before* the 1940 amendment and was approved by Division 4 of the Commission. Petitions for reopening, rehearing, reconsideration and postponement of the effective date were filed by the interveners, and by order dated August 29, 1940, Division 4 postponed the effective date pending a decision by the full Commission. While these petitions were pending, however, the Transportation Act of 1940 was enacted, which amended Section 5 of the statute and which, *for the very first time*, included "the interest of the carrier employees affected" as a mandatory factor which the Commission must consider in passing upon transactions covered by the act.

In passing upon the case, the full Commission interpreted Section 5(2)(c), as amended, and explained wherein the *present* congressional policy respecting such transactions differs from that existing prior to 1940, and why the changes were made. The full Commission indicated in its decision that, but for the 1940 amendment, it would have affirmed Division 4's approval of the application. However, because of the provisions of the 1940 amendment, the full Commission reversed Division 4 and denied the application, stating: (p. 127)

> "Railroad organization consists of four important and indispensable factors, namely, land, labor, capital and management. High specialization is necessary for

each railroad factor. Whenever expert railroad labor is compelled to readjust and adapt itself to another industry, there is substantial loss to the individuals and to the general public. Congress has recognized this fact and in revising the statute has specifically required us to give consideration to 'the interest of the carrier employees affected.' Heretofore, we have given consideration to the interest of the carrier employees affected to the extent of imposing appropriate conditions in our order of approval. See *Chicago, R.I. & G. Ry. Co.; Trustees Lease*, 233 I.C.C. 21. *We are now specifically required to give consideration to the interest of such employees in determining whether the transaction is consistent with the public interest.* Under the proposed lease the future of any individual employee of the lessor would be uncertain.

"Applicant contends that the proposed transaction is consistent with the public interest because of the savings that would result from the consolidation of shops and the dismissal of employees. Under the amended act it is obvious that the savings would be insignificant during the period in which the employees would be protected by the provisions of our order complying with subparagraph (f). In other words, we are asked to give approval to this transaction based entirely on what the applicant believes will be the situation 4 to 5 years hence.

"Part of the alleged savings can be attained by modification of the reciprocal arrangement between the Burlington and the parties hereto, irrespective of our conclusion herein. The amount of future savings is uncertain and problematical. *No present advantage in the public interest is shown.*" (Emphasis supplied)

Note that because "the future of any individual employee of the lessor would be uncertain" and because "No present advantage in the public interest is shown" the Commission denied the application. In that case, as in the instant case, applicants sought to justify the transaction principally because of savings which would allegedly result from the consolidation, primarily through dismissal of employees.

Since its decision in the *Ft. Worth* case, and prior to the instant case, the Commission has *consistently* held (where the "interest of the carrier employees affected" was an issue raised as grounds for denial of the application) that Section 5(2)(c) requires it to *weigh* the gains or advantages to the public in point of service with the disadvantages to the carrier employees affected, and in every instance that we have found where approval has been given, the Commission has held that (1) gains and advantages would accrue to the public generally, and (2) such gains and advantages *outweighed* the disadvantages to the employees.

In *Oklahoma Ry. Co., Trustees Abandonment* 257 I.C.C. 117, at page 195, the Commission held that "the possible disadvantages to the employees do not outweigh the advantages to the public resulting from carrying out the proposed plan."

In the case of *A. C. Allyn and Company, et al Control; Transcontinental Bus System, Inc.—Control—Continental Bus System, Inc., et al,* 50 M.C.C. 184, the Commission pointed out that of the four specific factors enumerated in Section 5(2)(c), only two were involved (which are the same two which are involved in this case): "(1) the effect of the proposed transaction upon adequate transportation service to the public, * * * and (4) the interest of the carrier employees affected'." It then held that the advantages to be derived by the public generally from the proposed transaction outweighed the disadvantages to the employees.

Similar findings were made in the cases of *Ralph Marcuccilli, et al—Control; Marion Truck Company, Inc.,—Purchase—Harwood Trucking, Inc., and Jaqua Transit Lines, Inc.*, 50 M.C.C. 613, and *Deluxe Motor Stages of Illinois—Lease—Santa Fe Trail Transportation*, 39 M.C.C. 709.

A similar finding in the instant case is conspicuous by its absence. In fact, there is no statement or finding of any kind to indicate that the Commission gave *any* consideration to the "admitted adverse effect" upon the employees in determining whether or not the proposed transaction is consistent with the public interest.

Such a finding is absent in this case because there is absolutely no evidence upon which the Commission could have based a finding that the present gains or advantages to the public generally outweigh the admitted adverse effect this particular transaction will have upon the carrier employees affected. To the contrary, as a result of the admissions on cross-examination of applicants' witnesses (Tr. 123, 249-250, 397-398, 402-405) the Commission was compelled to find:

> "From the record it does not appear that the applicants contemplate that any immediate and direct improvement in service will result from the merger." (Sheet 69, Commission's Report)

In the instant case, the Commission did not overrule its decision in the *Ft. Worth* case, supra, but merely attempted to distinguish it from this case on the *sole* ground that "initial control was to be attained" in that case "by a lease rather than a merger of properties which have been controlled by the dominant company, through stock ownership, for more than 75 years." (Sheet 65, Commission's Report) The act makes no distinction whatever between a merger and a lease—*the act covers any method or device by which control is effectuated.*

Based on this sole basis for distinguishing the two cases, the Commission adopted the identical language of the Examiner (and to which exceptions were taken) as follows:

> "Under these circumstances, the application herein should not be denied because some (839) employees will be adversely affected in the event the merger is consummated. However, in view of the admitted adverse effect upon such employees approval of the application would have, consideration must be given to the protective conditions which should be imposed for their benefit." (Sheet 65, Commission's Report.) (Parenthetical figure added)

The Commission, and the District Court, presumably accepted the applicants' theory or interpretation of the statute to be (as stated in their brief to the District Court, at page 143) that "If the employees receive the protection contemplated by Section 5(2)(f), their interest in the proceeding is at an end."

If such a theory or interpretation of the statute is correct, then there would have been no need or reason for the inclusion of "the interest of the carrier employees affected" as one of the mandatory considerations by which the Commission must be guided in determining whether or not a proposed transaction is consistent with the public interest, because, in that event, Section 5(2)(f) alone would suffice.

It is a cardinal rule of construction, however, that the Court must construe a statute as a whole and, if possible, give meaning to all parts of it. *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208. Furthermore, this Court has already held in the *McLean* case, supra, that the provisions of Section 5(2)(c) must govern the *initial* decision by the Commission as to whether or not a proposed transaction should

be approved or denied. That that holding is correct is further obvious from the fact that Section 5(2)(f) is applicable to railroad employees only, and has no application at all, for example, to mergers of truck lines.

In support of their intrepretation or construction of the statute referred to above, the applicants rely upon this Court's discussion of the legislative history of the Harrington Amendment (Section 5(2)(f), in *Railway Labor Executives' Ass'n.* v. *United States*, 339 U.S. 142. The amendment as originally proposed provided "that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." While the bill was in conference, the Commission stated to Congress that "the proviso, by prohibiting any displacement of employees, goes much too far, ..." We agree. The bill was then changed in conference to its present form.

Applicants contend that the form of the bill as enacted (as Section 5(2)(f)) "completely negatives any possible construction that the discommoding of employees is a ground for denying a proposed consolidation." (Reply to Exceptions, page 75, filed on behalf of applicants)

Such a statement, we submit, is incorrect and is inconsistent with the facts. The bill as originally proposed would have prevented *any* merger or consolidation if *any* adverse effect, however slight, would accrue to the employees, regardless of any improvement in the service to the public which would result. The bill as finally enacted, however, simply provided that the Commission must evaluate the present gains or advantages to the public in point of service as a result of such a transaction, and weigh them against the adverse effect on the employees, *based on the proof in*

each individual case. The *Railway Labor Executives' Ass'n.* case involved an appeal to this Court of the *New Orleans Passenger Terminal Case*, 267 I.C.C. 763, wherein the Commission's interpretation of Section 5(2)(f) was found to have been incorrect.

In that case, the Court was not called upon to interpret Section 5(2)(c) of the act because no one denied that the transaction was consistent with the public interest. To the contrary, all parties, including the employees, conceded that the proposal was in the public interest in view of the numerous present gains to the public as a result thereof.

It is the position of these appellants that where (as here) there is an affirmative finding by the Commission that the proposed transaction will *not* result in any present gain to the public in point of service, and where (as here) there is specific evidence to show the exact extent and nature of the "admitted adverse effect" upon the 839 employees involved, the intent of Congress as expressed in Section 5(2)(c) is that approval of such a transaction must be withheld.

For the foregoing reasons, it is respectfully insisted that the Commission, and the District Court, have incorrectly interpreted Section 5(2)(c) of the act.

The Commission, and the District Court, have further misinterpreted Section 5(2)(c) of the act in another important respect.

In discussing the four enumerated factors specified in Section 5(2)(c), the Commission stated:

> "In administering these provisions we are to be guided *primarily* by consideration for adequacy of transportation, to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities. *New York Central S.*

Corp. v. *U. S.*, 287 U.S. 12; 25. The foregoing are the primary elements affecting the public interest with which the transaction must be consistent." (Sheet 67, Commission's Report) (Emphasis supplied)

Thus, the Commission has decided the instant case on the proposition that, as a matter of law, "the interest of the carrier employees affected" must *always* be subordinated to the consideration involving adequacy of transportation service, irrespective of whether, as here, there is an affirmative finding that there will be no present gains or advantages to the public generally in point of service, and irrespective of the proof with respect to the nature and extent of the "admitted adverse effect" upon the employees.[4] This holding of the Commission is erroneous because it is predicated upon the *New York Central* case, supra, which involved this Court's interpretation and construction of the act as it existed *prior to the 1940 amendment*, which, for the very first time, made the interest of the employees a mandatory consideration in determining whether or not a merger is consistent with the public interest.[5] Furthermore, in the *New York Central* case, the interest of the employees was not at issue.

Appellants herein challenged that holding of the Commission in their intervening complaint (Paragraph 4),

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[4] These appellants in their intervening complaint referred to the failure of the Commission to find from uncontradicted proof the extent of the adverse affect upon dismissed employees of the N. C. & St. L., based upon the uncontradicted proof of earnings in outside industry and its failure to find from other uncontradicted proof that such adverse affect would be permanent. The District Court, erroneously we submit, held that the Commission was not required to make such a finding. This phase of the case will be discussed later here.

[5] The amended act also clarified and restricted the term "adequate transportation" to read "adequate transportation *service*". As indicated earlier herein, the Commission affirmatively found that this merger would not result in any direct and immediate improvement in service.

but the District Court *failed to pass upon that part of said intervening complaint* in its Findings of Fact, Conclusions of Law, or in its final order dismissing the complaints.

Question 2

(a) Whether the Commission may approve a merger of two railroads where its order of approval does not require the fair and equitable arrangement to protect the interests of the railroad employees affected contemplated by Section 5(2)(f) of the Interstate Commerce Act.

(b) Whether the District Court, on review, may lawfully revise or amend an order of the Interstate Commerce Commission; or, whether it is limited to sustaining or setting aside such order, or to remanding the case to the Commission.

The order of the Commission is fatally defective in that it does not provide a fair and equitable arrangement to protect the interest of the 839 employees who will be affected by the merger. Because it did not contain such a fair and equitable arrangement, the District Court would not affirm the order as issued by the Commission. Instead, it approved the order subject to an "express condition" which was apparently designed to afford equal protection to the employees of the N. C. & St. L. but which "express condition", it is submitted, did not cure the defect which the District Court recognized in the Commission's order.

The testimony of 'applicants' witnesses is that all dismissals and transfers would come from the employees of only one of the two railroads to be merged. This testimony is summarized at Sheets 63-64 of the Commission's Report. Appellants herein relied upon this testimony throughout the proceedings before the Commission—in the brief to the Examiner and in the Exceptions to the Exam-

iner's Report, and during oral argument before the Commission. At no time did the applicants deny that all such dismissals and transfers would come from only the one railroad.

Statements made by members of the three-judge District Court during oral argument were to the effect that if the order of the Commission required all dismissals to come from only the N. C. & St. L., substantial justice would not be done, as follows:

> "Judge Martin: Now, frankly, Brother Grubbs, here is what all three of us are concerned with, and that is a substantial justice of the case, and that is that the employees who are bumped off as a result of this merger should not be exclusively the employees of the NC&StL." (Page 184, Transcript of Proceedings before District Court)

Notwithstanding the testimony of the applicants' witnesses recited in the Commission's Report, one member of the Court commented that the *order* of the Commission does not *require* all dismissals to come from only one railroad, as follows:

> "Judge Darr: As I understand, the railroad counsel in open court concedes that this order does not arbitrarily say that all persons who may be employed in the merged railroad who will be discharged will be N&C employees?
>
> "Mr. Grubbs: Absolutely, Your Honor.
>
> "Mr. Harwood: It does not say that they won't be from the N&C either, Your Honor.
>
> "Judge Darr: Well, that's putting it two ways." (Page 193, Transcript of Proceedings before District Court)

That there is nothing in the Commission's order to *prevent* all dismissals from coming from only the N. C. & St. L. employees is indicated from the statement of counsel for the Department of Justice, as follows:

> "Mr. McConnell: If I may come out on this because I had occasion to try to get into it with the Examiner Sunday to find out exactly what happened, and *this order does not purport to do anything about seniority.*" (Page 182, Transcript of Proceedings before District Court) (Emphasis supplied)

The District Court recognized, however, that seniority is one of the most valuable rights the working man has (Transcript 191). One of the judges commented:

> "Judge Darr: (interrupting) When there is a merger, why, it doesn't matter about the size of the company. *The employees should be taken care of according to seniority regardless of which road they were formerly employees.*" (Page 181, Transcript of Proceedings before District Court) (Emphasis supplied)

It was subsequently suggested, however, that the employees would have their unions to protect their seniority rights (Tr. 180, 187).

If the District Court's holding was that the employees may not look to the Court to uphold the law, but must rely on negotiations by their collective bargaining representatives (presumably to the extent of calling a strike if necessary) to secure for them the "fair and equitable arrangement to protect the interests of the railroad employees affected" required by Section 5 (2)(f) as a condition of approval by the Commission, then the Court was clearly in error. The responsibility of upholding the law is in the Courts—not the labor unions.

Counsel for the Commission also took the position that the Commission's order does not purport to say which employees of the two railroads should be retained by the surviving railroad, or under what conditions. Instead, he contended that that was left to the *managerial discretion of the carriers* as limited by their collective bargaining agreements (Tr. 195).

It is submitted that the carriers have already exercised their managerial discretion as indicated by the testimony of their own witnesses' that all dismissals and transfers would come only from the N. C. & St. L. Insofar as the collective bargaining agreements of the L. & N. and the N. C. & St. L. are concerned, none of them were introduced in evidence and were not before the Commission or the District Court.

The only collective bargaining agreement referred to by name in the proceedings is the so-called Washington Job Protection Agreement, which the record shows was executed and entered into by the N. C. & St. L. Railway. Although the N. C. & St. L. was committed to that agreement, the applicants are on record in this case as contending that the 1940 amendment of the act (Section 5(2)(f) *superseded this collective bargaining agreement* (R. 594, 595) and that under the amended act, the Commission now has the duty of prescribing the protective conditions in its order of approval, and which must be complied with notwithstanding the fact that the N. C. & St. L. was committed to the Washington Job Protection Agreement. (R. 278)

Appellants herein recognize that the Commission should not be expected to pass upon each and every individual employee who would be dismissed or retained. They do insist, however, that the terms and conditions of the Commission's order should contain a "fair and equitable arrangement" to protect their interests and which would

preclude the exercise of managerial discretion to the extent that all dismissals would come from the employees of only one of two railroads to be merged, irrespective of their length of service as compared to the length of service of employees of the other railroad.

The Commission's order further does not comply with Section 5(2)(f) in that the protective conditions imposed are wholly inadequate and were made without regard to the fact that the "admitted adverse affect" upon the employees would be *permanent*, and without regard to the *extent* of the adverse affect as measured in dollars and cents, all of which was shown by uncontradicted proof.

Appellants herein alleged in their intervening complaint before the District Court that the Commission had not complied with the Federal Administrative Procedure Act (28 U.S.C. Section 1007) by its failure to consider and to pass upon an exception to the Examiner's Proposed Report, alleging that he failed to find from uncontradicted evidence that the "admitted adverse affect" upon the employees affected would be permanent, or to find from the uncontradicted evidence the extent of such permanent adverse affect. The District Court in its Conclusion of Law No. 7 held that the Commission was not required to make such a finding.

This conclusion of law is clearly erroneous first, because the Commission was required to pass upon the exception; second, because evidence showing the *nature* and *extent* of the adverse affect upon the employees has a direct bearing upon one of the enumerated factors under Section 5(2)(c) which the Commission is required to consider in determining whether or not the transaction is consistent with the public interest, and, third, if the transaction is found to be consistent with the public interest, then such evidence has a direct bearing upon the nature and extent of the conditions

which the Commission should impose in its order of approval so as to provide the "fair and equitable arrangement" to protect the interest of the employees involved contemplated by Section 5(2)(f).

This Court held in *Railway Labor Executives' Ass'n.* v. U. S., 339 U. S. 142, that, under the provisions of Section 5(2)(f), the Commission has the power and authority to impose any conditions in its order of approval that may be justified by the proof in order to provide the fair and equitable arrangement contemplated by the act. In that case there was no evidence of earnings in outside industry, whereas in this case there is specific, detailed evidence showing exactly the loss in pay which would accrue to dismissed employees in Nashville over and above the customary four-year protective period, which was provided for in this instance. Such evidence is of particular significance in this case in view of the fact that the Commission found that there will be no immediate and direct improvement in the service to the public as a result of this merger.

The Commission, therefore, was required to pass upon the exception involved, in view of the provisions of the Federal Administrative Procedure Act, and the District Court should have so held.

It is respectfully insisted that the order of the Commission does not provide for the "fair and equitable arrangement to protect the interests of the railroad employees affected" as required by the act as a condition of approval. This is evident by the fact that the District Court refused to affirm the order as issued by the Commission, but instead, based its approval upon an "express condition" referred to earlier herein.

Since the District Court did not unconditionally approve the order as issued, another serious and important question is presented: whether on review the lower court may attempt to cure a defective order by stating that it is ap-

proved conditionally, or, is the reviewing court limited to sustaining or setting aside such an order (or to remanding the case to the Commission).

We submit that the District Court is without power or or authority under the pertinent provisions of 28 U.S.C. Sections 1336 and 2321-2325 to revise or amend orders of the Commission. Therefore, the lower court erred in not reversing the order, or in not remanding the case to the Commission to afford it an opportunity to correct the defect.

The Court should not exercise administrative functions of the Commission because, as this Court has held, "the function of the reviewing court ends when an error of law is laid bare." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21 (1952). If the Commission were required to consider all of the uncontradicted proof relating to the nature and extent of the adverse effect upon the employees, and then impose conditions for their protection which would be actually fair and equitable based on such uncontradicted proof, the Commission might well determine that the merger should be denied.

Question 3

Whether the District Court may sustain an order of the Commission where it did not have before it at the time the case was decided and therefore did not consider material exhibits to the proceedings which were filed subsequent to the hearing before the Commission pursuant to instructions from the Hearing Examiner.

From the state of the record it is quite clear that the Commission overlooked and did not consider vital and material evidence when disposing of the Exceptions filed by the Employee Association to the Examiner's Proposed Report. The District Court overruled appellants' allega-

tions to this effect in their intervening complaint stating in Conclusion of Law No. 7(d) that the record shows that the Commission did consider the contentions of the employee group and rejected them.

The District Court, however, at no place indicates where in the Commission's Report it is shown that the exception was considered by the Commission.

During the hearing before the Examiner the issue arose as to whether the L. & N.'s cost of repairing and maintaining its diesel locomotives was excessive—being far and above the cost for comparable work performed by the N. C. & St. L. This issue is material and is important in this case because the entire merger has been approved on the apparent theory of savings in money to the carriers, and upon the alleged improvements in service to the public which "should" be brought about "in the long run" from such savings (notwithstanding the affirmative finding of the Commission that there would *not* be any immediate and direct improvement in the service to the public as a result of this merger).

The Commission (and the District Court) accepted and reiterated the Examiner's finding that "Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger." However, the Commission (and the District Court) has completely ignored specific evidence submitted by the applicants' own witnesses showing that there *is* something left to be done which offers opportunity for tremendous savings—*an amount which approximates the entire sum proposed to be saved by firing 550 employees.*

The only operating witness for the carriers was asked to confirm the fact that for the year 1954 (the year preceding the hearing) that the L. & N.'s cost of repairs and maintenance to its diesel locomotives was more than *twice*

that of the N. C. & St. L. based upon their respective costs per diesel unit. The witness did not deny the figures showing this fact, but merely stated that he felt it would be difficult to make a proper comparison on that particular basis, giving his reasons for such statement (R. 396).

This is the testimony which was accepted by the Examiner and the Commission, and is apparently the basis for the District Court's Conclusion of Law No. 7 to the effect that the Commission considered the exception of the Employee Association relative to this point and rejected it. (Sheets 55-56. Examiner's Proposed Report; Sheet 54, Commission's Report.)

It is the *subsequent* testimony of this same witness on further cross-examination by counsel for the Employee Association, and his subsequent testimony on rebuttal, together with his own exhibit on rebuttal which has been completely ignored by the Commission and by the District Court.

Since the witness testified that a comparison of the repair and maintenance costs of the L. & N. and the N. C. & St. L. would be difficult on a diesel unit basis, the witness was asked what would be the proper basis for comparing the efficiency or cost of repairs by two different railroads. In reply, the witness stated the proper basis for comparison would be their respective costs per *diesel locomotive mile* (R. 409-410). Subsequent proof introduced by the Employee Association showed that even on this basis the L. & N.'s costs were still more than *twice* that of the N. C. & St. L.

This same witness, on rebuttal, introduced Exhibit H-62 in an effort to rebut his own earlier testimony and to rebut the proof introduced by the Employee Association referred to above. The first sheet of this exhibit purported to show the respective costs of the two railroads for a five year period, based on the costs per *diesel unit mile*. (A diesel

"unit mile" refers to the operation of only one diesel unit for one mile, whereas a diesel "locomotive mile" refers to the operation of a complete locomotive, regardless of the number of diesel units making up the complete locomotive.)

As originally filed, Exhibit H-62 showed the L.&N.'s cost of repairs per diesel unit mile as being *less* than that of the N. C. & St. L. The exhibit was shown to be in error, however, in that the figures purporting to show the N. C. & St. L. diesel *unit* miles were actually diesel *locomotive* miles, and the exhibit was admittedly incorrect. Applicants were then required to file a revised first sheet of Exhibit H-62 as a late-filed exhibit showing N. C. & St. L. diesel *unit* miles, so that a proper comparison could be made. A revised first sheet of Exhibit H-62 was subsequently prepared and filed, but was not given any consideration as will be hereinafter shown.

The revised first sheet of applicants' Exhibit H-62 shows that the cost of repairs and maintenance on the L. & N. was approximately 47% higher than that of the N. C. & St. L. for a *five year period*, on the basis which applicants' own operating witness stated to be the proper basis for comparison.

Had the L. & N.'s cost of repairs been brought into line with that existing on the N. C. & St. L., it could have saved in 1954, for example, $2,300,000.00—almost exactly equal to the total amount expected to be saved each year by firing 550 employees. No evidence or reason was given by the applicants to show why the L. & N.'s repair costs should be any higher than the N. C. & St. L.'s.

The Examiner's Proposed Report contains no reference whatever to the revised exhibit or the cross-examination of the sponsoring witness by counsel for the Employee Association, or of his testimony on rebuttal, all of which completely changed and discredited his previous testimony, which the Examiner did accept. The Commission's report

likewise contains no reference to the exception of the Employee Association concerning the Examiner's failure in this regard. Instead, the Commission merely repeated verbatim the language used by the Examiner regarding the witness' earlier testimony, and upon which the District Court apparently based its Conclusion of Law No. 7 to the effect that the Commission did consider the exception but rejected it.

That the Commission ignored the testimony and exhibit referred to in the paragraphs next above is further obvious from the following:

a. The Revised First Sheet of Exhibit H-62 was filed as a late-filed exhibit, after the hearing had been concluded.

b. The Examiner made no reference whatever to the revised exhibit or to the testimony of the sponsoring witness on cross-examination by counsel for the Employee Association, or any of his testimony on rebuttal which completely changed and discredited his previous testimony, which the Examiner did refer to in his Proposed Report.

c. The Commission likewise ignored the revised exhibit and the pertinent testimony referred to above in its Report and Order. It merely repeated verbatim the language used by the Examiner, and did not pass upon the exception to the Examiner's failure to consider it.

d. The Secretary of the Commission when certifying the transcript and exhibits for filing in the District Court failed to include the revised first sheet of Exhibit H-62; a motion to dismiss and strike the footnotes contained thereon; the ruling of the Chief of Finance of the Commission sustaining the objection to said footnotes.

e. The Secretary of the Commission acknowledged the incorrectness of his original certification on May 7, 1957, and submitted to counsel for appellants herein a corrected certification and enclosed certified copies of the documents referred to in the subparagraph next above, stating "the

originals of which are now on file and of record in the office of said Commission." (Appellants herein filed an amendment to their intervening complaint, including copies of said documents, which amendment was allowed in open Court without objection. The corrected certification was not received until after the hearing before the District Court, but was promptly filed with the Court, with notice thereof having been given to all parties of record.)

Had this revised exhibit, together with the testimony relative thereto, been considered by the Commission, or by the District Court, it is obvious that they could not have made their respective findings that "Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger."

Since the Report of the Commission does not contain a single reference to the exception of the Employee Association, or of the exhibit and testimony relied upon in support of the exception, it is respectfully submitted that the District Court erred when it held that the Commission considered the exception and rejected it. Furthermore, had it considered it, under the provisions of the Federal Administrative Procedure Act, (28 U.S.C. Section 1007(b)), the Commission was required to pass upon the exception and give a reasonable basis for rejecting it.

Respectfully submitted,

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APPENDIX A

Please see Jurisdictional Statement filed on behalf of appellants, City of Nashville, Tennessee, et al., for:

Findings of Fact and Conclusions of Law of District Court.

Order of District Court.

Order-Bond of District Court.

APPENDIX B

TITLE 5, U. S. Code:

§ 1007. Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record.

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

. . . . . .

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. June 11, 1946, c. 324, § 8, 60 Stat. 242.

TITLE 49, U. S. Code:

National Transportation Policy

Act Sept. 18, 1940, ch. 722, title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12 and 13 of this title, by inserting before part I thereof

(chapter 1 of this title) the following provision entitled 'National Transportation Policy:'

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12 and 13 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act (chapters 1, 8, 12 and 13 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 5. Combinations and consolidations of carriers—Pooling; division of traffic, service, or earnings.

* * * * * * *

Unification, Mergers, and Acquisitions of Control.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management,

and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifica-

tions as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * * * * *

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such trans-

action will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

TITLE 28 U. S. Code:

Section 2323. Duties of Attorney General; interveners

* * * * * * *

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

* * * * * * *

Office - Supreme Court, U.S.
FILED
OCT 29 1957
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 519

LUTHER THOMAS LAMBERT, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY BRIEF IN OPPOSITION OF APPELLANTS, LUTHER THOMAS LAMBERT, ET AL., TO THE MOTION TO DISMISS OR AFFIRM OF APPELLEE, LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

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SUPREME COURT OF THE UNITED STATES

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LUTHER THOMAS LAMBERT, ET AL.,
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Appellants, Luther Thomas Lambert, Vernon H. Hedgepath, and the NC&StL Railway Employees Job Protection Association submit this their Reply Brief in Opposition to the Motion to Dismiss or Affirm of Appellee, Louisville and Nashville Railroad Company, the appeal heretofore filed on behalf of appellants and which appeal has now been assigned Docket No. 519.

I

The Appeal Conforms to the Rules of the Court

Paragraph II of the Notice of Appeal filed on behalf of these appellants contains the following statement:

> "These intervening plaintiffs, appellants herein, request that this appeal be joined and consolidated with that which is being filed simultaneously by the plaintiff and appellant City of Nashville, Tennessee, and that a combined transcript of the record in this cause be prepared by the Clerk for transmission to the Clerk of the Supreme Court of the United States, said combined transcript to include the items set forth in the notice of appeal filed by the said City of Nashville. . . . In addition to the above, these appellants request that the Clerk include in the transcript of this cause the following. . . ."

This request was made with the full knowledge and consent of the plaintiff, and appellant, City of Nashville, Tennessee, and none of the appellees objected thereto. A combined transcript was prepared and filed with the Clerk of the Supreme Court, said combined transcript containing certain items specifically designated by appellants herein.

The appellant, City of Nashville, Tennessee, paid the docketing fee and filed its own jurisdictional statement and the case was assigned Docket No. 365. The jurisdictional statement of these appellants was prepared and filed with the Clerk of the Supreme Court on September 23, 1957, within the sixty day period prescribed by Rule 13, and a copy thereof was actually received by appellee, Louisville and Nashville Railroad Company on September 24, 1957 (Footnote 1, p. 1, Motion), also within the sixty day period.

The first indication counsel for these appellants had that the two appeals would not be consolidated under one docket number was receipt of a letter from the Clerk, dated September 26, 1957, received by counsel on September 28, 1957, requesting payment of a docketing fee of $100.00. While it was felt that an additional docketing fee should not be required, a check for that amount was forwarded to the Clerk the same day, and the appeal was docketed by the Clerk on September 30, 1957, under a separate number.

Failure to docket a case within the prescribed time is not jurisdictional and does not deprive the Court of its power to hear the appeal. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 84-86.

II

The Questions Presented Are Substantial.

Before replying to the contentions of appellee that the questions presented are not substantial, we wish to reply to a statement contained in appellee's opening statement concerning the fact that the District Court based its approval of the Commission's order upon an express condition that N. C. & St. L. Employees should be protected equally with L. & N. employees.[1]

Appellee states at page 4 of its Motion as follows:

> " . . . the court, clearly was not, in the language to which appellants here refer, finding any fault with, or undertaking to revise or amend, the Commission's order, but was undertaking merely to make clear and certain that the Court's interpretation was that such order did not *direct* or *authorize* any discrimination

[1] The final order of the District Court does not require or insure equal protection. See pages 18-21, appellants' Jurisdictional Statement.

against N. C. & St. L. employees. . . ." (Emphasis added).

This very point gives rise to one of the principal questions presented by this appeal. Appellants contend that Section 5(2)(c) of the act (Title 49 U.S.C.) requires an *affirmative* arrangement or plan which will adequately protect the interests of the employees affected, and which will *prevent* discrimination, even though such discrimination may not be "directed" or "authorized" by the Commission's order.

Appellants' Question No. 1 Presents a Substantial Question

Appellee does not properly summarize appellants' Question No. 1 in its discussion beginning at page 6 of the Motion. Appellants have not contended that the Commission "ignored the interest of the affected employees". They have said that the Commission ignored their interest *in determining in the first instance* whether or not this particular merger is consistent with the public interest, and that if their interest was considered (which we deny) it was not given proper weight, but was subordinated to the factor involving adequacy of transportation service based on an erroneous interpretation of Section 5(2)(c) of the act, as amended.

Appellants have insisted that the Commission imposed what are alleged to be (but in actuality are not) liberal protective conditions for the employees affected, and then dismissed their interest from *any* consideration in the determination of whether or not the merger is consistent with the public interest, as required by Section 5(2)(c).

At page 7 of the Motion, it is stated that there is no support for appellants' contention that the protective conditions are not in fact liberal. But appellee nowhere

points out or shows wherein the protective conditions imposed are in any way more liberal than those customarily imposed when applied to this case. Furthermore, the Report and Order of the Commission shows on its face that the conditions imposed are the same as those imposed in the *New Orleans Passenger Terminal* Case, 282 I.C.C. 271. In that case, however, there was no proof whatever of earnings in outside industry (page 280). In the instant case there is detailed and uncontradicted evidence showing exactly the loss in dollars and cents which would accrue to dismissed clerical workers in Nashville, for example, in the event they are fortunate enough to procure work of the same general type in Nashville. The loss was shown to be from $18,000.00 to $30,000.00 each (depending upon the position held) from the average age of 49 until the age of retirement, *excluding* the four-year protective period imposed by the Commission's order. (See pages 420-429, 1440-1452, Transcript of Proceedings before the Commission, and pages 30-35, Exceptions of appellant, NC&StL Railway Employees Job Protection Association made Exhibit "f" to appellants' intervening complaint.)

At page 12 of appellee's Motion, it is stated that appellants construe too narrowly the statutory words, "the effect of the proposed transaction upon adequate transportation service," in that appellants rely upon the affirmative finding of the Commission that "it does not appear that the applicants contemplate that any immediate and direct improvement in service will result from the merger." Appellants' position is supported by the Commission's decision in *Fort Worth & Denver City Ry. Co., Lease*, 247 I.C.C. 119 (1941), and many others (discussed in appellants' Jurisdictional Statement, pages 10-13). While appellee attempts to belittle the *Fort Worth* decision, it has never been overruled.

At pages 18-20 of its Motion, appellee cites *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, *McLean Trucking Company, Inc., et al,* v. *United States* (1944) 321 U.S. 67, and *Schwabacher* v. *United States*, 334 U.S. 182, as authority for its contention that "adequacy of transportation service" is the *primary* consideration by which the Commission should be guided in cases of this kind. In those cases, the interest of the employees was not at issue, and in the absence of that issue, "adequacy of transportation service" may become the primary guide or standard.

Appellants' Question No. 2 Presents a Substantial Question

In discussing appellants' Question No. 2, appellee asserts that the question presented is not substantial; that appellants have taken an inconsistent position; and, that they have included a question not listed in their notice of appeal.

The question presented is substantial because it goes to the very heart of Section 5(2)(f) of the act which provides that as a condition of approval the Commission's order shall provide a fair and equitable arrangement to protect the interests of the employees involved. The question presented challenges the arrangement provided in the Commission's order. The second part of the question is substantial because if the District Court may not revise or amend the Commission's order, then it is void.

As for the charge that appellants have taken an inconsistent position relative to whether or not the District Court has, by its *final order*, actually in effect revised or amended the Commission's order, it is submitted that when the entire document to which appellee refers is considered, there is no inconsistency. Furthermore, the authority and comments set out at page 24 of appellants' jurisdictional

statement in this regard were lifted almost verbatim from the Memorandum on Behalf of the United States and the Interstate Commerce Commission with Respect to the Form of Judgment and the Plaintiff's Application for a Stay Pending Appeal (page 5) submitted to the District Court.

Appellee charges (page 21, Motion) that appellants have erroneously represented the testimony of applicants' witnesses to the effect that all dismissals and transfers would come exclusively from employees of the N. C. & St. L. Railway, rather than from both railroads. This has been the position of the appellant, NC&StL Railway Employees Job Protection Association, throughout the proceedings before the Commission and before the Court. (See page 8, Brief to Examiner, and page 30, Exceptions to the Examiner's Proposed Report, filed on behalf of the employee association, being Exhibits "d" and "f" to appellants' intervening complaint.) Appellants' contention in this regard was not controverted by appellee in its Reply to Exceptions, or in its brief to the District Court, submitted prior to the hearing before that Court.

In support of its contention that there is no testimony to the effect that all dismissals will come exclusively from the NC&St.L, appellee cites a portion of the cross examination of witness Tilford (Page 22, Motion). The next two questions and answers which follow appellee's quotation are pertinent:

> "Q. Let us take the traffic department. L. & N. has 14 employees and N. C. & St. L. has 81 (at Nashville). You expect to reduce that to 32?
>
> "A. Yes.
>
> "Q. Can you give any information as to how many of the 81 will be retained and how many of the 14 will be retained?
>
> "A. I imagine the whole 14 would be retained, and

the dismissal(s) will come out of the N. C. & St. L. group." (Parenthetical expression and emphasis added).

Witness Tilford also testified on direct examination as follows:

"... that the net change at Nashville and Davidson County, or *net loss in number of employees*, would be 669.

On the system, the total positions that we expect will be eliminated—NC&StL system—is 550. Then there will be transferred from their present place of employment approximately 289." (Transcript of testimony before the Commission, pages 33-34) (Emphasis added)

And on cross-examination he further stated:

"Q. Your 289 figure, was that derived from an estimate of new jobs that would be created at Louisville, then?

"A. There will be jobs that would be created at Louisville, to which we would transfer these employees that were agreeable to be transferred." (Page 263, Transcript of testimony before the Commission)

Thus, the record does show that all transfers and dismissals will come from the NC&StL alone—there is not one word in the entire transcript of the proceedings before the Commission to show that *any* employees of the L. & N. will be transferred, dismissed, or displaced as a result of the merger!

Appellee charges (page 23, Motion) that appellants have raised a question not included in their notice of

appeal relative to the failure of the Commission to find that the adverse effect on the employees affected would be permanent or to find the extent of the admitted adverse upon them. Whether or not the admitted adverse effect upon the employees will be permanent or temporary, and the extent of the adverse effect in dollars and cents, where such was shown by uncontradicted proof, has a direct relation to the question presented concerning whether or not the protective conditions imposed by the Commission are adequate and comply with the requirements of Section 5(2)(f) of the act.

Rule 10, Par. 2(c) of the Court's rules, specifically provides that questions presented shall not be repetitious and that "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

Concerning the adverse affect upon the employees, the Commission found at Sheet 64 of its Report, as follows:

> "A general employee survey of the Nashville labor market, made in May 1955, disclosed that the prevailing wage level for the Tennessee Company clerical workers was much higher than that paid for similar work in other Nashville industries; that for most firms hiring clerical workers the age range insisted upon was between 18 and 30 years; and that, except for railroad employees workers at Nashville were not unionized. The average age of clerks in the employ of the Tennessee Company at Nashville is over 49 years and the average length of service with the railroad is almost 24 years. The averages for the various other classes of employees are about the same, or slightly higher, than for the clerks."

The Commission failed to consider other uncontradicted proof showing how much more the clerical workers of the Tennessee company are paid for similar work than is paid by other Nashville industries for similar work; that the differential has existed for many, many years; and, that there is no reasonable basis to conclude that this spread or difference in wages would ever be diminished or eliminated in the future. The testimony of the expert witness presented by the employees is to the effect that this spread or difference would be permanent. This testimony was not rebutted in any way.

Appellants' Question No. 3 Presents a Substantial Question

The certified copy of the transcript of the proceedings before the Commission was procured by appellant City of Nashville. These appellants had no knowledge of the fact that the certified copy of the transcript as furnished by the Secretary of the Commission was incomplete. That fact was learned quite by accident. When it was ascertained, counsel for these appellants promptly wrote the Secretary of the Commission requesting that he correct his erroneous certification, and copies of the omitted documents were submitted to the District Court by a proper amendment to their intervening complaint. The corrected certification containing the statement, "the originals of which are *now* on file and of record in the office of said Commission," was not received until after the case had been argued before the District Court, although it was promptly filed with the Court.

The question involved goes to whether or not the *Commission* had all the material exhibits before it when deciding the case and whether or not the District Court may sustain an order of the Commission in such an event.

The exhibits referred to were filed after the hearing before the Commission pursuant to instructions from the Hearing Examiner.

Respectfully submitted,

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(7499-7)

SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1957.

LUTHER THOMAS LAMBERT, Et Al., - - - - Appellants,

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Et Al., - - Appellees.

No. 519.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

MOTION OF APPELLEE, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, TO DISMISS OR AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

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IN THE

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No. 519.

MOTION OF APPELLEE, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, TO DISMISS OR AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

I.

THE MOTION.

Louisville and Nashville Railroad Company, appellee in the above-entitled case,[1] pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United

[1]Intervening defendant below, as of right, under 62 Stat. 970 (1948), as amended, 63 Stat. 105 (1949); 28 U. S. C. §2323. Appellee received appellants' Jurisdictional Statement on September 24, 1957.

States, moves to dismiss the appeal because it has not been taken in conformity with the Rules of this Court or, in the alternative, that the final judgment and decree of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to need further argument.

In support of this motion this appellee respectfully presents the following:

II.

BRIEF IN SUPPORT OF THE MOTION.

Opening Statement.

The appeal here is from the same decision of the three-judge, specially-constituted district court (for the Middle District of Tennessee, Nashville Division) as the appeal in *City of Nashville, Tennessee, et al. v. United States and Interstate Commerce Commission, et al.*, No. 365, to be referred to hereinafter as the *Nashville* case.

The appeal should be dismissed because the case was not docketed, as required by Rule 13 of this Court's rules, within sixty days after the filing of the notice of appeal. The notice of appeal bears the stamp of the Clerk of the district court "Filed Jul 26 1957 John O. Anderson, Clerk By R. D. Hall D.C." The case was docketed in this Court on September 30, 1957, or more than sixty days after the filing of notice of appeal, in violation of Rule 13. The jurisdictional statement is also in violation of other rules of this Court, as will hereinafter be shown.

While this, we believe, should be enough to dispose of the appeal, we proceed to show that; in any event, no substantial question has been presented by appellants.

By footnote 2 at page 4 of their Jurisdictional Statement they state that in their notice of appeal they requested "that the two appeals [this one and that taken in the *Nashville* case] be consolidated, or heard by the Court at the same time." And thereafter: "Appellants herein adopt and rely on the questions presented as set forth in the jurisdictional statement of the City of Nashville, *et al.*, in addition to those set forth herein." In the brief of appellee Louisville and Nashville Railroad Company on its motion to affirm the decision of the lower court on that appeal, we have been at pains to show this Court that although many questions were therein presented, not one of them is at all substantial. We will not repeat here the showing there made but refer to it as though it were a part of this brief, particularly insofar as appellants herein adopt and rely on the questions raised by that appeal.

The fact is that the questions separately stated by appellants here are by no means entirely separate questions from those raised in the *Nashville* appeal, as will hereinafter appear.

Two observations with respect to appellants' statement of the case seem appropriate before discussing the questions they ask the Court to pass upon.

The first is that the presumption indulged, that the lower court "felt that the [Interstate Commerce] Commission's order, as issued, did not comply with the

statute" (p. 7), because it expressed its approval of the order as being upon the condition that N. C. & St. L. employees should be protected equally with L. & N. employees under the Commission's decision, is entirely unwarranted. This may clearly be seen in the court's unequivocal conclusion:

> "Neither the plaintiff nor any of the intervening plaintiffs has shown any ground upon which the court could justify an order annulling, vacating, or setting aside the order of the Commission." (p. 13, typewritten copy of decision.)

As we showed with particularity in our brief on our motion to affirm in the *Nashville* case (pp. 44-49), the court clearly was not, in the language to which appellants here refer, finding any fault with, or undertaking to revise or amend, the Commission's order, but was undertaking merely to make clear and certain that the court's interpretation was that such order did not direct or authorize any discrimination against N. C & St. L. employees and that it was with that understanding or interpretation that the Commission's order was approved.

Secondly, the appellants' statement (p. 7) that the "uncontradicted testimony of applicants' witnesses . . . that *all* dismissals and transfers would come from"[1] N. C. & St. L. employees is not only not supported in the brief by any reference to the record but is not supported by the record nor by the Commission's decision, as we shall hereinafter demonstrate.

Statutes referred to herein are reproduced in the Appendix.

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[1] Italics theirs.

Summary of Argument.

The questions presented by this appeal overlap those presented in the appeal of the City of Nashville, *et al.*, in No. 365, October Term, 1957, in which this appellee has filed a motion to affirm.

The Interstate Commerce Commission fully and completely satisfied the requirements of Section 5(2)(c) and 5(2)(f) of the Interstate Commerce Act relating to the effect on employees of a railroad merger, in its report and order in *Louisville & Nashville Railroad Company, et al. Merger etc.*, 295 I. C. C. 457, which are here assailed.

The weight to be accorded the considerations specified in Section 5(2)(c) of the Interstate Commerce Act is for the Commission, not the courts.

The Commission must be guided, in a railroad merger case, by the over-all Congressional policy of development and maintenance of an economical, efficient and adequate railroad system as a matter of primary national concern.

The lower court did not undertake to alter or revise the Commission's order here assailed but only to interpret it, and, as interpreted, the court approved it.

Appellants raise several questions not properly before this Court because not seasonably raised.

No substantial question is presented by appellants.

Appellants' Question 1 Presents No Substantial Question.

Question 1 as stated by appellants (pp. 4, 8) is in two parts. The first part is whether the Commission may, in a railroad merger case under Section 5 of the Interstate Commerce Act,[1] lawfully ignore the interest of affected employees or fail to give proper weight to such interest.

The question is not substantial because, first of all, this is not a case where the Commission ignored the interest of affected employees. To the contrary, the most sympathetic and serious consideration was accorded this aspect of the case by the Commission. This will at once clearly be seen by even a casual examination of the Commission's report. *Louisville & Nashville Railroad Company, et al. Merger etc.*, 295 I. C. C. 457, at pp. 500-503 and 505-506.

In the second place, the weight to be accorded such a consideration is necessarily for the Commission. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 68 (1944); *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 358-360 (1936); *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461, 487 (1929); *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 36 F. 2d 789, 801 (W. D., Mo., 1929), affirmed 282 U. S. 74 (1930); *Virginia Stage Lines* v. *United States*, 48 F. Supp. 79, 82-83 (W. D., Va., 1942).

Appellants, however, preface and qualify this question in such a way as to suggest that "under the guise

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[1] 24 Stat. 380 (1887), as amended, 54 Stat. 905 (1940), 63 Stat. 485 (1949); 49 U. S. C. §5.

of imposing what are alleged to be (but in actuality are not) liberal protective conditions" (pp. 4, 8) the Commission proceeded unlawfully in dealing with the interest of affected employees. The reference to "alleged to be . . . liberal" is to the following finding of the Commission:

> "It is generally conceded that the conditions recommended by the examiner, and which we hereby adopt, are more favorable than any heretofore imposed in merger cases. . . ." (295 I. C. C. at p. 502.)

The nature of such conditions is described at pages 42 and 43 of our brief in support of our motion to affirm in the *Nashville* case. There was, as there appears, and as appears more particularly at pages 500-503 of the Commission's report, no ignoring or failure to accord weight to the interest of affected employees under any guise or in any manner.

The parenthetical charge that the protective conditions imposed by the Commission are not in fact liberal is unsupported anywhere in appellants' jurisdictional statement and is unsupportable. As the Commission stated, they are the most liberal conditions ever prescribed in such a case.

The second part of appellants' Question 1 is whether the Commission may give "primary consideration to the factor involving service and a lesser or secondary consideration to the interest of the employees" where the Commission makes a finding "that there will be no immediate and direct improvement in the service to the public" (pp. 4, 8).

This part of the question, like the first part, proceeds from erroneous assumptions both as to the law and the facts.

Appellants say here, in substance, that there are four considerations enumerated in Section 5(2)(c) of the Interstate Commerce Act[1] to be weighed in a railroad merger case; that only two of them are at issue here, one relating to "service" and the other to the "interest of the employees"; that in such circumstances it is for the Commission to weigh the service gains or advantages to the public against the disadvantages to the employees; that this is the way the Commission has always proceeded in such cases as this one; and that here, since the Commission found that "it does not appear that applicants contemplate that any immediate and direct improvements in service will result from the merger," and since it found that there is an "admitted adverse effect" upon employees, the latter consideration outweighs the former and therefore approval of the transaction should have been withheld (pp. 8-18).

The first and principal error here is in the manifest misconception of the meaning of Section 5(2)(c), which reads:

> "(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon

[1] 54 Stat. 906 (1940); 49 U. S. C. §5(2)(c).

> the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

The statute does not confine the Commission's consideration to the four factors specified, or to any two of them, nor can it properly be read as saying that the Commission's function in such a case as this one is simply to weigh prospective service improvements against the effect of the transaction on employees. Appellants not only disregard the fact that the Commission dealt with all four considerations specified in the statute[1] but completely ignore the statutory words "among others," which follow the words "the Commission shall give weight to the following considerations."

This Court explained in *Schwabacher* v. *United States*, 334 U. S. 182, 193 (1948):

> ". . . The Act does not specify every consideration to which the Commission must give weight in determining whether or not any plan meets the tests. Section 5(2) provides only that, 'among others,' the Commission shall consider the effect upon adequate transportation service, the effect of inclusion or failure to include other railroads, total fixed charges, and the interests of the carrier employees affected. . . ."

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[1] 295 I. C. C. 457, at pp. 502-505.

The Commission weighed many considerations in its determination of the application in this case. Among these were the large economies and improved efficiency which could be effected by the merger,[1] the fact that the two involved railroads were exceptionally well adapted to integration and unified operations,[2] the fact that in studies of the Commission made pursuant to Transportation Act, 1920, the two railroads were treated together "as though any consolidation plans involving the 2 railroads would necessarily bring them together,"[3] the fact that in World War I the Federal Government operated them under a single Federal Manager,[4] the fact that the L. & N. owned approximately 75% of the capital stock of the N. C. & St. L. and had controlled it for more than 75 years,[5] the fact that railroads generally are today extremely hard-pressed by governmentally-subsidized competition by airway, highway and waterway and that in such a situation it is "imperative" for them "to do everything in their power to enhance their competitive situation,"[6] the fact that interested shippers throughout the involved territory supported the merger,[7] and the fact that two interested railroads supported it and no railroad or other form of transportation opposed it.[7]

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[1] *Id.*, pp. 477, 488-493, 504-505.
[2] *Id.*, p. 477.
[3] *Id.*, p. 478.
[4] *Id.*, p. 461.
[5] *Id.*, pp. 467-468, 474-476.
[6] *Id.*, pp. 479-480.
[7] *Id.*, pp. 480-481, 488.

These and other pertinent considerations are more fully presented at pages 35-49 of our brief in support of our motion to affirm in the *Nashville* case.

As is there shown, this Court has plainly pointed out, in *McLean Trucking Co.* v. *United States, supra:*

> ". . . Resolving these considerations [those involved in a merger case] is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation [motor carriers], but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' [citing cases]" (321 U. S. at pp. 87-88)

Immediately following the language we have quoted hereinbefore from the *Schwabacher* case, this Court added with respect to the broad purposes of the Interstate Commerce Act in the light of which all sections of it must be read:

> ". . . This Court has recently and unanimously said in reference to this Act, 'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.' *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118." (334 U. S. at pp. 193-194)

The over-all purpose of Section 5(2) of the Interstate Commerce Act was pointedly explained by this Court in *United States* v. *Lowden*, 308 U. S. 225, 232 (1939), as follows:

> ". . . As a result of the enactment of the Transportation Act in 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy . . . The policy of consolidation is so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other."

While this was written in 1939 and Section 5(2) of the Interstate Commerce Act was amended in 1940, the change made in that section in 1940 was merely, as this Court subsequently explained in its decision in the *Schwabacher* case, to substitute "voluntary plans of merger or consolidation" for a nationwide plan of consolidations charted by the Commission under a directive of the Congress (334 U. S. at p. 193).

The next misstep of appellants is in construing too narrowly the statutory words, "[t]he effect of the proposed transaction upon adequate transportation service." They interpret this language as meaning [that the Commission shall consider] whether there will be any immediate and direct improvement in service as a result of the involved transaction, and they regard the Commission's finding that "it does not appear that the applicants contemplate that any immediate and direct improvement in service will result from the merger" as putting an end to that consideration.

They do not seem to recognize as being within the scope of these statutory words the following finding of the Commission made immediately after the finding quoted and relied on by them:

> ". . . Nevertheless, it is our view that the accompanying savings and improved efficiency of operation necessarily would strengthen the applicants and render them capable of better service. This we find should, in the long run, result in improvement of the service which they otherwise would be able to render. . . ." (295 I. C. C. at p. 504)

Or the following, immediately thereafter:

> ". . . Applicants have spent vast sums of money in improvements to their equipment and plant. Additional improvements are planned for the future, particularly with respect to expanded yard facilities at Atlanta, Birmingham, and Louisville. Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger. Applicants can see and identify aggregate savings of more than $3 million per year, with other possible savings, some suggested in the record, and others perhaps not yet envisoned. . . ." (p. 504)

Or the following:

> "Combining the facilities and resources of the Kentucky company and the Tennessee company under one management would give better control of mounting operating costs and enable the surviving company to meet more effectively competition from other modes of transportation. The

anticipated accomplishments from the merger would give assurance of a stronger and financially more stable railroad.

"Single ownership and control of the properties will tend toward a more economical and efficient operation which, in turn, will inure to the benefit of the shipping public: Compare *Bessemer & L. E. R. Co. Merger,* 275 I. C. C. 167, 179. It will also, in this case, result in desirable corporate simplification, will reduce accounting work with its attendant expenses, and will materially reduce the number of reports which must now be filed individually by the applicants with regulatory commissions and other public authorities." (pp. 504-505)

Ignored entirely by the appellants is the following finding:

". . . On the whole, we conclude that the merger would enhance the adequacy of service by the merged companies, and would constitute the best use of the facilities." (p. 504)

Appellants furthermore fail to recognize that in the finding they cite and rely upon, the Commission was necessarily employing the term "service" in a narrow sense, as referring to such things as expedition and frequency of train movements, because it elsewhere found that other advantages to shippers, properly to be called service advantages in a broader sense, would immediately accrue. This is shown at pages 18-21 of our brief in support of our motion to affirm in the *Nashville* case.[1]

[1]Please see also the quotations from the Commission's report cited at page 75 of that brief.

In asserting that the Commission did not in this case weigh the interests of the affected employees against the advantages to the public from the proposed merger; appellants not only overlooked or disregarded the Commission's aforementioned sympathetic treatment of the subject of the effect of the transaction on employees (295 I. C. C. at pp. 500-502 and 505-506) but particularly the Commission's conclusion that "the application herein should not be denied because some employees will be adversely affected in the event the merger is consummated" (p. 501).

Appellants' assertion (p. 12) that [since the decision of the Commission in *Fort Worth & D. C. Ry. Co. Lease,* 247 I. C. C. 119 (1941)], "the Commission has consistently held . . . that Section 5(2)(c) requires it to *weigh*[1] the gains or advantages to the public in point of service with the disadvantages to the carrier employees affected" (by which we understand appellants to mean the weighing of the one against the other) can not be supported by authority and the cases cited by appellants do not support it.

Only one decision (*Oklahoma Ry. Co. Trustees Abandonment,* 257 I. C. C. 177 (1944)) is quoted from, and we reproduce as follows the Commission's statement from which that quotation is lifted:

> "Section 5(2)(c) specifies certain considerations to which, among others, we shall give weight . . . Among other considerations is 'the interest of the carrier employees affected.' In passing upon these applications, therefore, we have given weight to that *as well as other considerations,* and

[1] Italics theirs.

> have reached the conclusion that under the circumstances shown, and with the conditions here imposed, the possible disadvantages to the employees do not outweigh the advantages to the public resulting from carrying out the proposed plan." (p. 195; italics ours.)

The full statement thus clearly reveals that it does not support appellants' proposition, nor is there anything in the other cases cited to support it. In one of them, *Marion Trucking Co., Inc.—Purchase—Harwood Trucking*, 50 M. C. C. 613 (1948), the following appears:

> ". . . The interest of the carrier employees affected is *only one of many elements to which weight must be given* in considering whether a proposed transaction is consistent with the public interest. . . ." (p. 632; italics ours)

As to the *Fort Worth* case, put forward by appellants as an outstanding authority, we have shown, at pages 35-42 of our brief on our motion to affirm in the *Nashville* case, that that case was quite unlike this one, but apart from that fact that the decision therein is not a reliable authority, never having been followed or cited as an authority, so far as we have been able to find, in any subsequent case.

Appellants are misleading in saying further (p. 14) that the Commission and the district court presumably accepted the theory of appellees that "[i]f the employees receive the protection contemplated by Section

5(2)(f),[1] their interest in the proceeding is at an end." The quoted statement is from appellee's brief in the district court but is lifted out of context—it being from a discussion of the question whether appellants could show irreparable damage. Appellants here use it to indicate that appellee took the position that the Commission should only consider Section 5(2)(f) and need not consider Section 5(2)(c) insofar as the effect of the merger on employees is concerned. Appellee took no such position in that brief (and has never taken any such position) but to the contrary there took the position that:

> "Section 5(2)(c) of the Interstate Commerce Act provides merely that in passing upon a proposed transaction such as a rail merger, the Commission shall 'give weight' to four considerations, 'among others,' one of those four considerations being the interest of the carrier employees af-

[1]Reading:

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

fected. . . ." (p. 127 of appellee's brief in the district court)

The position was taken further (p. 132) that the Commission had considered both Section 5(2)(c) and Section 5(2)(f) in reaching its determinations. Such also is the position we have taken before this Court in our brief on our motion to affirm in the *Nashville* case, as may be seen at pages 41-42 of that brief.

Finally, in their presentation under Question 1, appellants concede (p. 16) that the Commission dealt with Section 5(2)(c) [as well as Section 5(2)(f)] and the considerations enumerated therein, and declared with respect thereto that "[t]he foregoing are the primary elements affecting the public interest with which the transaction must be consistent" (295 I. C. C. at page 503), but complain of the fact that immediately prior to this quoted statement, and subsequent to its statement of the requirements of Section 5(2)(c), it made the following statement:

> ". . . In administering these provisions we are to be guided primarily by consideration for adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25. . . ." (295 I. C. C. at pp. 502-503)

Appellants say this statement is erroneous and operates improperly to subordinate the interest of the employees. But that is not so. The language, moreover,

is taken almost verbatim from a decision of this Court. Appellants say it comes from the decision in *New York Central Securities Corp.* v. *United States,* 287 U. S. 12 (1932), and that that decision was rendered prior to the time of the 1940 amendments to Section 5 of the Act. That is true, but is of no significance.

The language assailed is very close to the language of the national transportation policy, written into the law in 1940, which calls upon the Commission "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers" and concludes:

> ". . . all to the end of developing, coordinating, and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Furthermore, this Court, in the *McLean* case, decided in 1944, used almost the same language as the Commission's language here assailed, it being there said by this Court (321 U. S. 67, 81):

> ". . . the Commission was to be guided primarily by consideration for 'adequacy of transportation service, . . . its essential conditions of economy and efficiency, and . . . appropriate provision and best use of transportation facilities. . . .' *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 25."

Furthermore, in the *Schwabacher* case, as we have seen, this Court said, in 1948, after referring to the contents of Section 5(2)(c):

> ". . . This Court has recently and unanimously said in reference to this Act, 'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.' *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118." (334 U. S. 182, 193-194)

Appellants' Question 2 Presents No Substantial Question. A Further Question, Relating to Compliance With the Administrative Procedure Act, Not Seasonably Raised by Appellants But Discussed Under the Heading "Question 2," Also Lacks Substantiality Besides Coming Too Late.

Question 2 as stated by appellants (pp. 4, 18) is also in two parts.

The first part is whether the Commission may approve a railroad merger where it does not require a fair and equitable arrangement to protect adversely affected employees as required by Section 5(2)(f). This is really no question at all since Section 5(2)(f) requires a fair and equitable arrangement to protect railroad employees affected, and the Commission in this case fulfilled that requirement. In doing so it said, as we have shown, that the protective arrangement prescribed was more favorable to the affected employees than any ever before prescribed in a merger case (295 I. C. C. at p. 502).

The second part of the question is stated as being whether the district court may lawfully revise or amend an order of the Commission or is limited to sustaining or setting aside such an order or remanding it to the Commission. As we have pointed out earlier herein,[1] and shown more fully in our brief[2] on our motion to affirm in the *Nashville* case, the district court did not undertake to revise or amend, in any way, the Commission's order but merely interpreted that order and approved it as so interpreted.

It is amazing that appellants should advance a contention to the contrary, for they unequivocally asserted before the district court:

> ". . . We submit that the Court, in its opinion, has not altered or revised the order of the Commission, but has simply interpreted it in such a manner as to make it free from ambiguity, which it clearly has the right to do."[3]

This should be sufficient to show the lack of any substance to appellants' Question 2, but there are two other representations of appellants on which comment seems appropriate.

Appellants erroneously represent that the testimony of applicants' witnesses was that all dismissals and transfers would come from employees of the N. C. & St. L. and that this is revealed in the Commis-

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[1] *Supra*, pp. 3, 4.

[2] At pp. 44-49 of that brief.

[3] In their "Reply to Memorandum on Behalf of the United States and the Interstate Commerce Commission with Respect to the Form of Judgment and the Plaintiff's Application for a Stay Pending Appeal," p. 1.

sion's report. The showing of applicants related to *jobs*, not to persons, that with the merger would no longer be needed. This may be seen in the testimony of the principal witness for the applicants, witness Tilford, President of the Louisville and Nashville Railroad Company. For example:

> "Q. Are substantial savings promised through elimination of jobs?
>
> A. Yes, but the elimination of jobs will be relatively small and much less than has been effected through reductions of forces by the involved roads in recent years, as shown on Sheet 6 of my exhibit. Approximately 550 *jobs* will be abolished within a year of the approval of the merger." (Tr. 33;[1] italics ours.)

The following is from the cross-examination of the witness by counsel for appellants:

> "Q. The employees that would be eliminated at Nashville would, of course, be the employees who had the least seniority with your company at Nashville?
>
> A. I am not sure. I can't tell about that. What will happen in seniority will depend on negotiations with the union. We would be willing to give them whatever seniority they have earned on the N. C. & St. L., but that would be [subject to] agreement with the Brotherhoods, as I see it" (Tr. 137).[2]

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[1]This reference and all such references hereafter are to the transcript of testimony before the Commission.

[2]Please see also Tr. 138, 263, 378, 384, 387, 539, 1420.

Upon the request of the attorney for the labor unions (Tr. 434-435), the applicants supplied for the record a detailed showing (in Exhibit H-59) of all personnel changes contemplated as a result of the merger, the showing being of *jobs* that would not be needed, not of *persons* to be affected. Thus the Commission found that 550 "jobs" held by employees of the N. C. & St. L. would be abolished and that 289 jobs would be transferred (295 I. C. C. at p. 500), not that the adversely affected persons would all be N. C. & St. L. employees. Indeed appellants themselves have recognized and stated that "the Commission's order does not *require* all dismissals to come from employees of the N. C. & St. L. Railway . . ."[1] (Emphasis theirs.)

Appellants allude to what transpired before the district court on the subject, but the reference is most inadequate. We believe our discussion of the subject at pages 44-49 of our brief in support of our motion to affirm in the *Nashville* case discloses precisely what took place on the subject in the lower court and the underlying basis for the statement of the lower court that is here assailed.

Finally, under the heading of Question 2, an attack is made (a) on the Commission's decision because it did not contain findings that the adverse effect on employees affected by the merger would be "permanent" and (b) on the district court for having concluded that the Commission was not required to make such a finding (p. 22).

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[1]Appellants' "Motion for Stay" addressed to Mr. Justice Brennan, p. 5.

The question thus presented was not listed in appellants' notice of appeal nor included in their statement of questions presented on appeal (pp. 4, 5) nor is it fairly comprised within the questions so listed. Rule 10, Par. 2(c), of the Rules of this Court provides that "[o]nly the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court" and Rule 15, Par. 1(c)(2), thereof, provides that the "jurisdictional statement may not raise additional questions or change the substance of the questions already presented." The Court has condemningly referred to such a practice as appellants here employ as "the practice of smuggling additional questions into a case." *Irvine* v. *California*, 347 U. S. 128, 129 (1954). But aside from this, the question presented is a frivolous one.

How could the Commission, or anyone, have made a finding that the adverse effect on those affected by the merger would be "permanent"? Some of those affected would be persons transferred from one locality to another. To the extent these are N. C. & St. L. employees (and appellants refer to no others), they would be going into the L. & N. organization, a larger and stronger railroad company, where they may very well find opportunities for advancement and job stability which could not have been theirs with the smaller and weaker N. C. & St. L. Railway.

Appellants' argument has ignored this consideration and is restricted to the proposition that because wages of railroad employees in Nashville are on a higher level than wages paid by other firms in that

City, dismissed employees in Nashville, having received four years' protection (as a minimum), *i.e.*, not being any worse off, paywise, for a period of four years, would continue ever thereafter to be adversely affected. That proposition is a plain *non sequitur*. How could the Commission have been expected to find that four years hence the presently existing relation between the compensation of railroad workers and other workers in the Nashville area (assuming that those dismissed in Nashville all remain in that City) would continue to be what it is today? Or how could the Commission have found that those dismissed in Nashville and who would become connected with other businesses there, or who might move to other localities, would be worse off rather than better off? Some of those persons indeed may find employment with the L. & N., for as appears in the Commission's report (295 I. C. C. at p. 503) the L. & N. intends to retain over 2,600 positions at Nashville, and those presently holding those positions will not continue indefinitely to hold them, deaths, retirements and resignations being events which constantly occur. Finally, the assumption that those adversely affected all live in Nashville is utterly baseless.

Question 3 Presents No Substantial Question and Improperly Raises a Question Not Presented to the Lower Court. Appellants Also Improperly Raise Other Questions in Their Presentation Under Question 1, Such Other Questions Not Having Been Set Forth in Their Notice of Appeal and Not Being Comprised in the Questions There Raised.

The final question stated by appellants, *i.e.*, whether the district court may sustain an order of the Commission where it did not have before it, and did not consider, exhibits filed subsequent to the hearings before the Commission, on instructions of the hearing Examiner, is a question which was not presented to the district court and therefore is not properly before this Court. *United States* v. *Atkinson*, 297 U. S. 157, 159 (1936).[1]

Appellants raised a variety of questions in the court below, but no question about the completeness of the record before the Commission, with which Question 3, as stated, is solely concerned. In their effort to show substantiality of their Question 3, appellants proceed to argue other questions: They argue that the Commission "overlooked" certain evidence in disposing of their exceptions, and that the lower court erred in overruling "appellants' allegations to this effect" in its Conclusion of Law No. 7 (pp. 24, 25), and they argue further that the district court did not have before it the entire record made before the Commission (p. 29).

[1]Other authorities on this point are cited at page 50 of our brief on our motion to affirm in the *Nashville* case.

While such questions are not properly before the Court, under Rules 10 and 15 of this Court's rules, to which we have hereinbefore adverted,[1] they are completely without substantiality.

As to the first one, appellants alleged in their complaint that the Commission "ignored and failed to consider"[2] the figures of record on the subject of diesel locomotive repair costs. It should be explained that applicants had shown that effectuation of the merger would produce savings of approximately $3,243,123 per annum.[3] This was not questioned by appellants, or by anyone, but appellants sought to overcome that showing by reliance on statistics which they say showed that the N. C. & St. L. performed diesel locomotive repairs at a lower cost than did the L. & N. Contrary to the allegation of appellants, the lower court found that the Commission did consider their "contention that diesel locomotive repair costs are higher on the Louisville and Nashville than on the Nashville, Chattanooga and St. Louis" and had rejected it.[4] That the court was entirely correct may be seen in the Commission's report, 295 I. C. C. at p. 493.

If there is any doubt about the Commission having considered and passed on the question—we do not see how there can be any doubt about it—it certainly dis-

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[1] *Supra*, p. 24.

[2] Paragraph 7, p. 6, of the complaint.

[3] 295 I. C. C. at pp. 491-492, 493, 504. As was explained in footnote 4 at page 14 of our brief on our motion to affirm in the *Nashville* case, this calculation was based on evidence of minimum savings and on evidence given in 1955, since when there have been increases in wages and price levels which would operate materially to increase the savings then estimated.

[4] Typewritten opinion, p. 12.

appears with the statement of the Commission, after nearly fifty printed pages of thoroughgoing review and treatment of the issues, that exceptions not specifically discussed or reflected in its findings or conclusions have been given consideration and are found to be not justified, 295 I. C. C. at p. 505.

If the record before the Commission submitted to the district court was to any extent incomplete it was due to the failure on the part of appellants, in their attack upon the order of the Commission, to make it complete, and if they failed to do so they cannot be heard to complain of the district court's decision on the ground that the record before it was not all that it might have been. Under the Administrative Procedure Act[1] a reviewing court is called upon in such a case as this one to "review the whole record or such portions thereof as may be cited by any party . . ."[2] A party cannot expect to profit from its own neglect in failing to see that every part of the record it desired to be before the court was before it.

But the record was not incomplete. Appellants themselves, as they admit at page 29 of their jurisdictional statement, filed in open court an amendment to bring to the court's attention the documents which they now complain the court did not consider. The documents having thus been brought to the lower court's attention, it cannot be assumed, as appellants do assume, that the court did not consider them.

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[1] 60 Stat. 237 (1946), as amended, 5 U. S. C. §1001, *et seq.*
[2] *Id.*, §1009(e).

Conclusion.

The case not having been docketed in this Court within the time permitted by the Court's rules, the jurisdictional statement of appellants having otherwise disregarded the Court's rules, in the respects we have herein specified, and it being clear and certain that appellants have submitted no substantial question, it is respectfully submitted that the appellee's motion set forth at the outset herein should be granted.

Respectfully submitted,

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Nashville 3, Tennessee,

Attorneys for Appellee, Louisville and Nashville Railroad Company.

PROOF OF SERVICE.

I, W. L. Grubbs, one of the attorneys for appellee, Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing motion to dismiss or affirm and brief in support thereof on appellants, and that I have heretofore (on September 6, 1957) served on them motion to affirm and brief in support in the companion case, *City of Nashville, et al.* v. *United States, et al.*, No. 365, cross-references to which appear in the foregoing motion and brief, by mailing copies thereof, in duly-addressed envelopes, with first-class postage prepaid, to their attorneys of record as follows:

Messrs. Walter Harwood and Judson Harwood,
Messrs. Harwood, Breedlove & Mittwede,
Nashville Trust Building,
Nashville 3, Tennessee.

This 15th day of October, 1957.

W. L. Grubbs

APPENDIX

Reproduction of Statutory Provisions Referred To

TITLE 5 U. S. C.

§ 1009. Judicial review of agency action

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

TITLE 28 U. S. C.

§ 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

TITLE 49 U. S. C.

Preceding § 1

"National Transportation Policy"

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantage of each; to promote safe, adequate economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to co-operate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

§ 5. Combinations and consolidations of carriers—Pooling; division of traffic, service, or earnings

Unifications, mergers, and acquisitions of control

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers, jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary

in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

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No. 519

In the Supreme Court of the United States

OCTOBER TERM, 1957

LUTHER THOMAS LAMBERT, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission, Washington 25, D. C.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

MOTION TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission, move, pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, that the final judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on June 20, 1957, by a three-judge court convened pursuant to 28 U. S. C. 2284 and 2325, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. This order, dated March 1, 1957, and entered in

Louisville & Nashville Railroad Company et al. Merger, etc., 295 I. C. C. 457, authorized a merger of the Nashville, Chattanooga & St. Louis Railway into the Louisville & Nashville Railroad Company. In the same order, the Commission approved the acquisition of direct control through stock ownership of the surviving corporation by the Atlantic Coast Line Railroad Company, and of indirect control of the surviving corporation by the Atlantic Coast Line Company.[1] There is pending before the Court in *City of Nashville, et al.* v. *United States, et al.*, No. 365, this Term, another appeal from the same judgment. We respectfully refer the Court to the Statement in our Motion to Affirm in that case, which sets forth the relevant facts.[2]

ARGUMENT

Appellees submit that none of the questions raised by the appellants is sufficiently substantial to require further argument.

Appellants state (Juris. St., p. 4, fn. 2) that they adopt the questions presented in the jurisdictional statement of the appellants in No. 365. As to such questions, we respectfully refer the Court to our Mo-

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[1] The Commission found that L. & N. has been controlled through stock ownership since 1902 by the Atlantic Coast Line Railroad Co., which in turn is controlled by the Atlantic Coast Line Company (295 I. C. C. 461).

[2] We note that these appellants filed their notice of appeal in the court below on July 26, 1957, and that the jurisdictional statement was not filed in this Court until September 30, 1957, sixty-six days later. While this is in excess of the sixty-day period provided by Rule 13, we do not take the defect to be jurisdictional. Cf. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 84–86.

tion to Affirm in No. 365. We confine ourselves here to the additional questions set forth in the jurisdictional statement of these appellants.

1. The appellants contend that in authorizing a merger of the two railroads the Commission failed to give proper weight to the interests of the railroad employees who would be affected by the merger (Juris. St. 8–18).

At the outset, we call attention to the appellants' suggestion in their "Question 1" that the Commission acted "under the guise of imposing what are alleged to be (but in actuality are not) liberal protective conditions for the benefit of the carrier employees affected." In its report (295 I. C. C. at 501), the Commission stated that "we will impose the same conditions for the protection of railway employees who may be adversely affected as were set forth in *New Orleans Union Passenger Terminal Case,* 282 I. C. C. 271." The so-called New Orleans conditions were prescribed by the Commission upon further hearing following this Court's remand in *Railway Labor Executives' Association* v. *United States,* 339 U. S. 142. These conditions are set out in the Appendix to this motion. The Commission's further finding that these conditions "are more favorable than any heretofore imposed in merger cases" (295 I. C. C. at 502) has not yet been challenged in this litigation, except as indicated above.

The appellants apparently contend that as a matter of law the Commission could not approve the merger without finding that the adverse effect upon employees would be outweighed by "present gains or

advantages to the public generally in point of service." In its report (295 I. C. C. at 502-503) the Commission summarized its statutory duty, as follows:

> * * * In disposing of transactions filed [under section 5 (2)], we must find, in the light of the considerations, among others, enumerated in section 5 (2) (c), that the applicants' proposal will, subject to such terms and conditions and such modifications as we may find to be just and reasonable, be consistent with the public interest. In passing upon such a merger, we are required by the provisions of section 5 (2) of the act to give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected. In administering these provisions we are to be guided primarily by consideration for adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. *New York Central Securities Corp. v. United States*, 287 U. S. 12, 25. The foregoing are the primary elements affecting the public interest with which the transaction must be consistent.

From this, the appellants contend that the Commission erroneously held that the interest of employees must always be subordinated to "consideration for adequacy of transportation service." The appellants

misread both the Act and the Commission's report.

To begin with, the primary test which Section 5 (2) (b) requires the Commission to apply to a proposed merger of railroads is whether it "will be consistent with the public interest." This Court has already held, contrary to appellants' contention, in *Schwabacher* v. *United States*, 334 U. S. 182, 193, that the four factors enumerated in Section 5 (2) (c) are not the exclusive criteria for determining the public interest, but are "considerations, among others" which the Commission must consider. In *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 25, this Court held that in Section 5 (2) (prior to the Transportation Act of 1940) "the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, * * *." Following the Transportation Act of 1940, in *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82, 87, this Court stated flatly that the National Transportation Policy "is the Commission's guide to 'the public interest' ", and that under that Policy the Commission must consider "the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy."

Thus, the Act as interpreted by this Court refutes the appellants' contention that the Commission could not approve the merger since it could not find "that any immediate and direct improvement in service will

result from the merger." Rather, it is clear that substantial savings and economies justify approval of a merger notwithstanding adverse effects upon carrier employees.

Even a casual reading of the Commission's report shows that it did not hold that the interest of carrier employees must always be subordinated to other factors. Assuming that insignificant economies and increases in efficiency would not warrant approval of a merger which resulted in serious losses to employees, this is not such a case.

2. (a) The appellants contend that the Commission erred in failing to determine in its order which employees of the two carriers should bear the loss of employment resulting from the merger (Juris. St. 18, *et seq.*).

The Commission noted in its report that "[a]ccording to testimony of the applicants, jobs of approximately 550 employees of the Nashville, Chattanooga & St. Louis would be abolished, and an additional 289 would be transferred; making a total of 839 employees affected by the proposed merger" (295 I. C. C. at 500). By this statement, the Commission merely identified the jobs or positions which would be affected by the merger. Neither in its report nor in the conditions which it imposed for the protection of employees did the Commission purport to determine which employees of the railroads should retain or lose employment as a result of the merger. As counsel for the Commission stated during oral argument in the court below, "the choice as to who is to be laid off is left by law to the managerial discretion

of the carriers as limited by their collective bargaining agreements."

A careful reading of the Jurisdictional Statement, particularly at pages 21–22, suggests that the appellants are cautiously suggesting that the Commission should have required a consolidation of the L. & N. and N. C. & St. L. seniority lists for the purpose of determining which employees should lose jobs. It is not necessary to determine whether or in what circumstances the Commission may so deal with seniority matters in an order issued under Section 5 (2). Cf. *Kent* v. *Civil Aeronautics Board*, 204 F. 2d 263 (C. A. 2), certiorari denied, 346 U. S. 826. Seniority is created by contract, and, with all of its ramifications of crafts, seniority districts, etc., is primarily a matter for negotiation and arbitration under the Railway Labor Act. *O'Donnell* v. *Pan American World Airways*, 200 F. 2d 929 (C. A. 2). Nothing in Section 5 of the Interstate Commerce Act, and particularly nothing in Section 5 (2) (f), dealing with protective conditions for employees, remotely suggests that the Commission must determine the basis upon which employees of merged railroads are to be selected for retention or dismissal. The emphasis of Section 5 (2) (f) is upon protection for the "railroad employees affected", rather than upon the determination of who shall be "affected".

The appellants did not produce, in the proceedings before the Commission, the collective bargaining agreements between the two railroads and their employees. Thus, they are in the position of insisting that the

Commission act upon a matter which is usually controlled by collective bargaining agreements, without even knowing the pertinent terms of the agreements. Clearly, the appellants have made no showing that the Commission acted arbitrarily in following its usual course of not prescribing seniority arrangements.[3]

(b) The appellants contend that the judgment of the court below must be set aside because, in sustaining the Commission's order, it did so "upon the express condition that the rights of the employees of the Nashville Chattanooga & St. Louis Railway Company shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved herein,

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[3] The appellants further contend that the Commission erred in not making a finding that the "adverse effect" of the merger upon the "employees affected" would be permanent (Juris. St. 22-23). The court below correctly held, in its Conclusion of Law No. 7, that the Commission was not required to make such a specific finding. Moreover, it is clear from its report (295 I. C. C. at 500) that the Commission was aware that at least some of the displaced employees might never regain employment with the merged railroad, and that the railroads' pay for clerical work was higher than the average of other Nashville employers. It is obvious that these factors were considered by the Commission in prescribing favorable protective conditions under Section 5 (2) (f). In any event, this contention was not fairly comprised within the questions stated in appellants' notice of appeal. See Rules 10, paragraph 2 (c), and 15, paragraph 1 (c) (2), of the Revised Rules of this Court.

disclosed in finding of fact Number 15."[4] The court below imposed this condition solely by reason of doubts created by these appellants as to whether the Commission had prescribed that the loss of employment resulting from the merger should fall solely upon the employees of N. C. & St. L. As pointed out above, no such determination was made by the Commission. Accordingly, the condition imposed by the court below is in no way inconsistent with the Commission's order. Since the condition, therefore, is superfluous in relation to the Commission's order, it would appear to be unnecessary to decide whether its imposition was improper under *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17. The appellees are not challenging this aspect of the judgment below, and it would seem that the appellants are wholly without standing to do so.

3. It is contended that the Commission failed to consider the Revised First Sheet of Exhibit H–62 purporting to show that L. & N.'s cost of repairing

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[4] The district court's Finding of Fact No. 15 reads as follows:

"15. Toward the conclusion of a lengthy colloquy concerning the protection of rights of the Nashville, Chattanooga & St. Louis Railway employees, counsel for the Interstate Commerce Commission, Robert W. Ginnane, Esquire, made the statement that the Commission is without power, in connection with a reorganization, to tell carriers who shall or shall not be laid off as a result of the merger. He stated further that the Commission's power and responsibility are limited to specifying protection of those who are laid off, the choice of those laid off being left to the managerial discretion of the carriers as limited by their collective bargaining agreements. The attorney stated, moreover, that the Commission merely identifies positions which would be affected and does not undertake to state what individuals would be affected."

and maintaining diesel locomotives was substantially higher than that of N. C. & St. L., from which they contend, in effect, that the merger application should have been denied because L. & N. could achieve substantial savings in this respect without a merger.

The Commission's report contains the following statement (295 I. C. C. at 493):

> Applicants, on the other hand, contend that it is difficult to compare railroads in the matter of cost of locomotive repairs because of the differences in (1) the types of locomotives, (2) the service in which they are used, (3) horsepower, and (4) the hazards encountered during a particular period; and that the record shows that, while the diesel repair costs of one road were higher than those of the other, the situation was reversed in the case of freight-car repair costs on the bases used.

The quoted statement clearly embodies a recognition by the Commission that L. & N. had higher costs for locomotive repairs. Of course, if L. & N. can effect operating economies in addition to those anticipated from the merger, the public interest will benefit. But the possibility of such other economies can hardly outlaw a proposed merger which will itself result in substantial economies.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

J. LEE RANKIN,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

OCTOBER 1957.

APPENDIX

Principal Provisions of Labor Conditions in New Orleans Union Passenger Terminal Case, 282 I. C. C. 271

The conditions prescribed in the New Orleans case are those contained in the so-called Washington Agreement of May 1936 between the various railroad companies and the railway labor organizations, provided, however, that the conditions for protection of employees prescribed in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I. C. C. 177, were to be applied as a minimum, subject to minor limitations.

The principal protection afforded an employee in the Oklahoma conditions is as follows:

(a) A protective period of 4 years from the effective date of the order in the protection case is prescribed, and if he is displaced in one position and retained in another paying less salary he is paid the difference in the average monthly compensation of the position from which he was displaced and the position in which he was retained from time of displacement to end of protective period. (Condition 4.)

(b) If not retained in any position, he is accorded a monthly displacement allowance equivalent to one-twelfth of the pay received by him in the last 12 months of his employment in which he earned compensation from time of displacement to end of protective period. Such compensation is reduced by wages received from benefits or other employment which he must, with certain limitations, accept if offered. (Condition 5.)

(c) During the protective period he is not to be deprived of benefits attached to his previous employ-

ment such as free transportation, pensions, hospitalization, relief, etc. (Condition 6.)

(d) If required to move his place of residence to accept another position he is reimbursed for all moving expenses for himself and immediate family and for actual wage loss not to exceed 2 days, and is protected against loss sustained by any forced sale of his then present home. (Conditions 7 and 9.)

(e) Matters in controversy to be submitted to arbitration, (Condition 8), except that specific procedures are provided with respect to sale of homes. (Condition 9.)

The Washington Agreement of 1936 established procedures as between carriers and employees for putting a coordination plan or merger into effect. The principal provisions thereof protecting an employee in case of displacement or rearrangement are:

(a) He is to be selected from all carriers involved on bases accepted as appropriate in the particular case, and any assignment is to be made on the basis of an agreement between the carriers and the organizations of the employees affected, or in the event of dispute submitted for arbitration. (Section 5.)

(b) He may not for a period of 5 years from the effective date of a coordination be placed in a worse position with respect to compensation and rules governing his working conditions and if he is forced to accept a job with less pay, he will be paid the difference in the average monthly compensation of the position from which he was displaced and the position in which he was retained. (Section 6.)

(c) If he loses his job he will receive an allowance based on length of service equivalent to 60 percent of his average monthly compensation during the last 12 months in which he earned compensation ranging from a period of 6 months for 1 years service to 60

months for 15 years service. The allowance starts on the date he loses his job. (Section 7.)

(d) He may not be deprived of benefits attaching to his previous employment such as free transportation, pensions, hospitalization, relief, etc. (Section 8.)

(e) If entitled to a coordination allowance he may resign and accept a lump sum separation allowance determined in accordance with a schedule providing for 3 months' pay for 1 year of service ranging upward to 12 months pay for 15 years of service. (Section 9.)

(f) If required to move his place of residence to accept a new job, he is reimbursed for moving expenses for himself and family and his own actual wage loss during time of transfer and not to exceed 2 days' pay for time required to find a place of residence in the new location, and he is protected against loss from a forced sale of his then present home. (Section 11.)

(g) If the carrier rearranges its forces in anticipation of a coordination for the purpose of depriving him of benefits under the agreement, the agreement will apply as of the date he is affected. (Section 12.)

(h) An arbitration committee is provided to settle all such disputes other than the sale of homes for which specific procedure is provided. (Sections 11 and 13.)

Under the New Orleans conditions, the employee has the benefit of both the Washington Agreement and the Oklahoma conditions, but cannot receive less than the protection afforded in those last mentioned. From a compensation standpoint, the Oklahoma conditions provide 4 years complete protection from the effective date of the order except that an employee with less than 4 years service is given compensation

for the length of his previous service, and the Washington Agreement provides, if affected within 5 years from the coordination date, a maximum of 60 percent wage protection from the date he is adversely affected for a specific number of months depending upon the length of service. If adverse effect is not suffered by an employee until 3 or 4 years after the effective date of the order so that he would receive little or nothing under the Oklahoma conditions, he may still be within the period permitting full benefits under the Washington Agreement. However, he cannot receive any of the benefits twice.

U. S. GOVERNMENT PRINTING OFFICE: 1961